The Supreme Court's Death Penalty War

The Washington Monthly

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Evan Thomas on Dean Acheson

Walter Shapiro Warns: Beware the Early Primaries in 2000

Fannie Mae

Just What Kind of Girl Is She?

by Michelle Cottle

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Letters

Old and Dangerous

While I agree with Charles Peters' note in the March issue about the problem posed by the growing fleet of sport-utility vehicles, I find the argument that things are not too bad now because 60 percent of the drivers are in the 40- to 65-years-old group to be rather surprising. First, right now 40 percent of these vehicles are not being driven by the supposedly safe 40- to 65-year-old folks, and second, what on earth makes you think that "drunks" have to wait until cars are cheap before they can buy them, or indeed that "drunks" are not a problem in the 40-65 age group?

MARSHALL CARTER-TRIPP
via e-mail

State Failures

The response of the embassy in Guatemala to an attack on an American is typical ("Tilting at Windmills," April 1998). Jennifer Harbury reports in her book, *Search for Everardo*, that the U.S. State Department knew about the torture and murder of her husband by the Guatemalan Army under CIA orders. Yet she was not told what they knew until after she went on two hunger strikes. One CIA employee was censured for telling Harbury what he knew about her husband.

ROY BERCAW
via e-mail

Missed Opportunities

I read with great interest Eric B. Schnurer's April article entitled "A Health Care Plan Most of Us Could Buy." During the health system reform crisis, I was employed as an attorney/health-policy manager at the American Medical Association and worked directly in health system reform. So much of what was being discussed at the time — by physicians, by insurers, by people from all sides of the debate — centered on the basic idea that Mr. Schnurer keeps alive in his article.

It still amazes me that the Clinton administration so badly messed up the political end of the reform debate. Without their incompetence in this issue, I believe a plan that resembled FEHBP would have come out of the legislative process that the Clinton administration should have allowed to occur. Such an idea was very much at the middle of what the debate was back then. It mirrors what the insurance industry itself was proposing, what physicians would have accepted since AMA's own plan incorporated the essence of the plan, and what conservatives would have lived with if no mandate on employers or individuals were included. The market for insurance would have improved dramatically for the great bulk of uninsured, leaving a more manageable group of chronically underinsured to deal with in other ways, perhaps with an expansion of a revamped Medicaid along the same lines.

It's funny how so many people who do not understand what happened back then feel free to comment on the failed health system reform debate in simplistic conservative and liberal terms. Because of Clinton's failure, someone from the right now needs to push this issue. Maybe someone like John McCain can do for health system reform what Nixon did for China. The American people would be well served.

DAVID HEIDORN
via e-mail

Not So Innocent

I noted with regret that Charles Peters did not delve further into the article by Serge Schmemann of *The New York Times* when he reported verbatim the words of that correspondent ("Tilting at Windmills," April 1998). Mr. Schmemann's statement that the hostages held by Israel with the approval of the Israeli Supreme Court were innocent Lebanese citizens not guilty of any crimes was blatantly incorrect. The hostages held by Israel in hope of exchange for Israeli soldiers and citizens held by Lebanon, Syria, and the Hezbollah were not innocent bystanders but had participated in terrorist attacks against Israel. Why else would Israel expect that these individuals would serve as bargaining tools in the continuing effort to free Israelis?

NELSON MARANS
Silver Spring, MD

Land Scam

I object to the ad in your April issue by the so-called Center for the Study of Economics, advocating increased land taxes. There is a great deal more land in the U.S. that is rural and undeveloped, and for that matter undevelopable, than the area in urban land. It might make some sense to tax the latter more heavily, although that in itself would only drive more development to the hinterland. But taxing rural land more will only hasten its sale for development purposes by owners who will no longer be able to afford to keep it. Consider the family farm!

The land tax advocates have failed to think through the likely outcomes of their program. They should go back to the study of economics and complete the course. You, in turn, do us a disservice by highlighting their position.

JOHN P. HUMPHREY
Horse Shoe, NC

Rereading King

Martin Luther King did support affirmative action, despite attempts by Robert Worth ("Beyond Racial Preferences," March 1998) and others to corral him for the opposite side of the argument. In 1967 he urged his organization, the Southern Christian Leadership Conference, to take action against businesses that failed to hire black Americans in proportion to their numbers in the population. Earlier, in his 1964 book, *Why We Can't Wait*, he wrote that the nation must "incorporate into its planning some compensatory consideration for the handicaps he [the Negro] has inherited from the past. It is impossible to

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create a formula for the future that does not take into account that our society has been doing something special against the Negro for hundreds of years. How then can he be absorbed into the mainstream of American life if we do not do something special for him now, in order to balance the equation and equip him to compete on a more just and equal basis?"

In the same book, King praised India's affirmative action program for untouchables. "It made provisions not alone for equality, but for special treatment to enable the victims of discrimination to leap the gap from backwardness to competence. Thus, millions of rupees are set aside each year to provide scholarships, financial grants, and employment opportunities for the untouchable."

King argued for compensatory and preferential treatment for America's blacks. He wrote, "Whenever the issue of compensatory or preferential treatment for the American Negro is raised, some of our friends recoil in horror. The Negro should be granted equality, they agree; but he should ask for nothing more. On the surface, this appears reasonable, but it is not realistic. For it is obvious that if a man is entered at the starting line in a race three hundred years after another man, the first would have to perform some impossible feat in order to catch up with his fellow runner."

JULIAN BOND
CHAIRMAN, NAACP
Washington, DC

Housing Costs

I was disappointed that *The Washington Monthly* chose to publish an article on our family shelter programs that so seriously misstates basic facts and distorts our philosophy and mission ("Out of Sight, Out of Mind," April 1998). With respect to the city's continuing commitment to provide permanent housing to homeless families, under Mayor Giuliani, we have placed over 19,000 homeless families into subsidized housing; about 500 more families than were placed within a similar time frame under previous administrations.

The article raises the serious and longstanding problem of the shortage of housing for low-income New Yorkers. According to the authors, "300,000 poor New Yorkers ... lack their own living space." While the precise number is open to discussion, there are certainly many thousands of New York families sharing apartments and homes with other people, usually family members. The authors propose that we give all of these families housing subsidies because subsidies, on a monthly basis, are cheaper than shelter. While the notion is superficially appealing, housing vouchers, as HUD has discovered, are enormously expensive.

Not only is this article full of simple factual errors — the number of families in hotels, the number of HPD apartments available, the number of Tier II shelters, the number of EARP vouchers used — it also betrays a fundamental misunderstanding of much of the basic information on which the premises are rooted. According to the authors, 25 percent of all New Yorkers spend over 75 percent of their income on housing. What the authors fail to understand is that these studies (we've never actually seen one with numbers as high as those quoted by the authors) do not count rental subsidies as income. Thus, for purposes of developing rent-income ratios, many families have rents, up to 90 percent of which can be covered by Section 8, that are hundreds of dollars a month more than their income — which is primarily public assistance. Clearly, this is not what the authors meant to illustrate.

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Tilting at Windmills

By Charles Peters

Hillary's Billing • Media Ignorance • Mountaintop Removal • The Army's Art Specialist • The President and the Nun

THIS ITEM IS DEDICATED TO Hillary Clinton and Sidney Blumenthal. Their conspiracy theories may not be as crazy as they seemed.

Consider David Bossie, Dan Burton's chief investigator, who was recently fired for his role in editing the Webster Hubbell tapes. Here's the background of objectivity he brought to that assignment: He started out with Citizens United, which Amy Waldman described in these pages in a May 1996 article as "an anti-Clinton interest group" that has "done more to shape media coverage of Whitewater than anyone else in Washington or Arkansas." From there he went to a job that a Citizens United fund-raising letter described this way: "Our top investigator, David Bossie, is on the inside directing the probe as Special Assistant to U.S. Sen. Lauch Faircloth on the U.S. Senate Whitewater Committee." Faircloth, you will recall, is the senator who persuaded Judge David Sentelle to drop Robert Fiske and appoint Ken Starr in his place, later rewarding Sentelle with a job for his wife on the senator's staff.

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THE TOBACCO INDUSTRY front group recently ran an ad attacking the McCain bill's tax on cigarettes. The tag line reads, "It's Not About Kids, It's About Money!" This certainly captures the tobacco industry's guiding principle: We don't care about kids, we care about money.

A few liberals have been confused by the argument that the cigarette tax will fall most heavily on the poor. What's wrong with that if it reduces the number of cigarettes they smoke or if the cost keeps kids from taking up cigarettes in the first place?

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WHAT ONE KNOWS OF HISTORY inspires doubt about history. If you were there it's sometimes hard to recognize the version of events that the historians give us. An example — see the review on page 48 of this issue — is the impression that people now seem to have that there was a cover-up of the fact that FDR's legs were paralyzed. What I remember is that everyone knew he couldn't walk unaided. Although he was not photographed in a wheelchair, he was also not shown walking or even standing without the assistance of an aide's arm, or something else, like a cane or a railing. Usually there was both the arm and the something else. He drove a Ford that we were told was specially equipped with hand controls. Furthermore, in the '30s polio was known as infantile paralysis. And because it was a major health problem — this was before Salk and Sabin — most people knew one or more victims of the disease. There was no mystery. Paralysis meant paralysis. FDR's birthday was an occasion for dances held throughout the country and sponsored by the March of Dimes with a slogan that went something like "Dance So They Can Walk."

What one knows of history inspires doubt about history.

In 1937, my father took me to the White House. There was a reception for presidential electors, of whom he was one. As we reached the receiving line we saw Mrs. Roosevelt but not the president. When we asked about him, we were told he had been there in his wheelchair but had started to tire and had been taken away. This was not a small, exclusive party. There were more than 500 presidential electors plus their spouses and lots of kids like me. So FDR's paralysis was hardly a secret. Later on, in the 1940s, the White House *was* guilty of secrecy. They concealed the deteriorating cardiovascular condition that was to lead to FDR's death. It is possible that public knowledge of his condition could have affected the results at both the 1944 conventions and the election.

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THERE ARE THREE NATIONAL rating services that evaluate charities. Two approve any charity that spends at least 60 percent of its donations on the people it is supposed to help. The third only requires 50 percent. This strikes me as a remarkable revelation of how much we've come to accept charities that devote disproportionate sums to fund-raising and executive salaries and perks. The Salvation Army offers a contrast by which the others should be judged. It spends 86 cents of every dollar helping people.

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"WE'RE RETURNING TO THE economy of the '50s and '60s — a remarkable, remarkable combination of strong growth without inflation," the Council of Economic Advisers' Jeffrey A. Frankel recently told *The New York Times*. I hope you recall that during most of this decade this magazine was almost alone in pointing out the possibility of repeating the prosperity of the '50s and '60s when practically everyone else was saying you couldn't have growth without inflation.

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MY NEW PHONE BOOKS JUST arrived. The Yellow Pages, which seemed to weigh a ton or so last year are now even heavier. This year's white pages, which contain only residential phone numbers, are even thinner — three-fourths of an inch at most. The reason for the disparity is that Bell Atlantic took the business numbers out of the White Pages and put them in the Yellow Pages so you will have to read the ads. Last year I said I feared a hernia from trying to lift the Yellow Pages. What actually happened is that my wife threw out her shoulder, so usually we just dial 411 to get the number, which adds to Bell Atlantic revenue.

By the way, when our phone went out last month, the repairman didn't come the next day as they used to do but three days later. And the problem wasn't our fault but Bell Atlantic's.

The truth is that although long distance service is better these days, local service is worse and much costlier. In fact it has deprived this magazine of one of its weapons against greedy landlords. We used to say, "If you raise the rent, we'll move." Now we have to face the fact that reconnecting the phones, which used to cost $100 or so, socked us with a bill for $1,500 the last time we did it. Have you ever wondered what happened to the competition that deregulation was supposed to bring to local telephone service?

Pending the improbable arrival of that competition, I have an idea for enterprising entrepreneurs: build a special stand for the Yellow Pages like the ones for unabridged dictionaries. They should sell like hot cakes!

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LAST YEAR XEROX'S CEO, PAUL Allaire, was paid $16.6 million in salary and bonuses. The company also announced plans to lay off 10 percent of its employees.

CEOs are earning 209 times what they pay their average factory worker. In 1965, the multiple was 44.

As the big shots do better and better, the lot of the poor continues to head south. *The New York Times* reports that the supply of low-rent apartments dropped by 900,000 in a recent four-year period, while the number of "very low income" families grew by 370,000.

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I RARELY AGREE WITH *The Wall Street Journal*'s editorial writers, but I applaud their attack on Bill Clinton's hypocrisy in threatening to veto vouchers for students from the poor families of the District of Columbia. How can the Bill Clinton who sent Chelsea to Sidwell Friends oppose similar opportunities for the poor!

The *Journal* also reminded me that the president's mother, Virginia, sent him to a Catholic school when the family moved to Little Rock. "I wanted him to have a good school," she said, instead of "the inferior county school," adding, "I will never forget the nuns for as long as I live for giving him such a good start."

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GROWING UP IN WEST VIRGINIA was a continuing lesson in the evils of the coal companies. Mostly controlled by out-of-staters, they avoided paying anything like their fair share of taxes and their contempt for workers and the environment was seldom concealed. Have they changed? Not a bit.

Recently in West Virginia they've been trying to shift the burden of making up a $2.2 billion deficit in the state's workers' compensation fund from high-risk employers like themselves to low-risk companies and to the taxpayer. And you may have seen the recent "Nightline" episode on ABC that showed how mountaintop removal is decapitating the state's once-beautiful terrain. Seventy-five of these hideous projects are mining coal now and would you believe that the Republican governor, Cecil Underwood, a former coal company executive who received $518,000 in campaign and inauguration contributions from his mining industry pals, is now trying to expand mountaintop removal!

And if you thought federal laws were protecting miners from black lung disease, you ought to read a recent series in the *Louisville Courier-Journal* that says as many as 3,600 working miners have black lung. The reason is that the coal companies lie when they report the results of tests of air quality in their mines. Two dozen former mine owners actually admitted to the *Courer-Journal* that they had falsified tests.

The paper exploded another myth about black lung: that strip miners don't get it. In fact, people who work 20 years or more in strip mining have a 61 percent chance of getting black lung.

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HERE'S A TIMELY WARNING TO those who are sympathetic to legislation that would encourage the merger of banks and brokerage houses. Nationsbank has been fined $7 million by the SEC for letting brokers work side by side with bankers and capitalizing "on the belief that bankers are more trustworthy than brokers." The brokers, according to Leslie Eaton of *The New York Times*, "also misled investors, many of whom were

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elderly people who had previously invested in federally guaranteed certificates of deposit, about the risks of investing" in bond funds that were not federally insured. Sounds a lot like good old Charlie Keating's Lincoln Savings and Loan, doesn't it?

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ANOTHER CLINTON STATEMENT that left me incredulous came in his radio address about the IRS when he said he was "outraged" by reports of what "seemed to be an unaccountable, downright tone-deaf agency." He's been in charge of it for five and a half years!

I've repeatedly tried to warn the world of the White House's ignorance of what is going on in the agencies and departments of the executive branch. But no one pays attention except when there is a scandal like the one at the IRS.

Ken Starr and his crew seem increasingly demented.

The reason for this, I suspect, is that the press itself is almost totally uninformed about the executive branch, with the exception of the White House and the office of the Independent Prosecutor. Aside from a handful of reporters who regularly cover the Pentagon and the State Department, the rest of the government, meaning all the agencies dealing with domestic matters, is largely terra incognita to the press. The reason reporters love Lewinsky-type scandal is that it's easy for them to deal with, requiring no background in the substantive issues of government. Because serious coverage of the executive branch requires such a background, they avoid it because they don't want to risk revealing the depth of their ignorance.

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The Washington Post RECENTLY ran an article about pending legislation to provide vouchers for D.C. schools that contained the statement, "The $3,200 would be sufficient to cover tuition at just a handful of area private schools and some crowded inner-city parochial schools, Democratic opponents of the bill said." Why didn't it occur to the reporter or his editor to find out if that statement is true? A simple check of past *Post* stories would have turned up one that ran within the last two years that showed most Catholic schools in the D.C. area had vacancies and almost all charged less than $3,200. Finding out if that situation continues today should not involve more than a few phone calls, and it would have provided crucial help to the *Post*'s readers in forming their opinion of the bill.

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ONE REASON THE BAD apples were allowed to remain in the IRS is because it's so hard to fire federal employees. If you doubt me, consider the case of a Grade-7 "art specialist" at the Oakland Army Base's Arts and Crafts Center. You may wonder why the Army needs an art specialist or an arts and crafts center. I can't answer that for you, but I can tell you that this employee who, like other federal workers was entitled to 13 days of sick leave a year, stayed away for one month without being fired, then two, three, four, five, six months. Finally after he'd been AWOL for seven months, he was fired. He sued to get his job back, saying he had stayed away because his boss made him nervous and that he was disabled. The disability: "stress disorder."

He lost his first appeal, but won a second. The Army then appealed that decision. "All this took several years," according to *The Washington Post*'s Mike Causey, to whom I am indebted for this item. The Merit Systems Protection Board has issued a six-page single-spaced decision saying it can't decide and is sending the case back to one of its regional offices to determine "whether the Army made reasonable efforts under the law to accomodate the employee and his disability."

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HAVE YOU HEARD ABOUT Midwest Express Airlines? For coach fares that are competitive with those of the other airlines, Midwest gives you two-by-two seating in comfortable leather chairs and lots of legroom, plus free champagne with breakfast and Merlot or Chardonnay with the lunches and dinners that are served hot on real china with linen napkins and glasses that are made of glass instead of plastic. Midwest does all this for its passengers and still, according to *Newsweek*'s Daniel Pederson, "has turned a profit 11 years in a row while scoring top marks in national surveys for not losing luggage."

What one hopes is that Midwest's example will inspire emulation by other airlines. What is, alas, more likely is that Midwest will be taken over by one of the giants whose hard-nosed management will decide that more profit can be made if service is reduced to the level of other airlines.

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IF IT HAS SOMETIMES SEEMED TO you that the most reckless drivers on our roads and streets are the police who are supposed to be making them safe, I have a statistic to support your suspicions. According to Rusty Marks of the *Charleston Gazette*, in the last 18 months Charleston's 45 police cars have been involved in 82 accidents, of which even the police concede they were at fault in 36.

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ALTHOUGH I DISAGREED ON almost every issue with the Republican Congress that came to power with Newt Gingrich in 1995, there was one thing I admired about them. They worked hard, harder

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than any Congress in years. You could actually find most of them on the floor or in their offices on Friday afternoon, and there were many sessions that lasted late into the evening. But this year the fellows have lapsed. "In the first 110 days of 1998," writes Carl Leubsdorf of the *Dallas Morning News*, "Congress met for only 30 legislative days, and it has only 59 more daily meetings scheduled in the 197 days before the November elections."

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IF SAT SCORES AS A MEASURE of human potential make you uneasy, columnist Carl Rowan shares your concern. And he has some experience to back him up. He's been a member of a scholarship committee that looks not only at SAT scores but at high school grades, essays written by applicants, letters of recommendation, extracurricular activities, all of which you might expect, but also at the hardship the student might have overcome. The committee also listens to speeches by the applicants and questions them on the issues of the day. In the resulting ranking, the highest rated applicant was a young woman with an SAT of 1150. By contrast, an applicant who was ranked 122nd of 128 had an SAT score of 1420.

There are just too many important human qualities that are not revealed by the test scores. I remember when I worked at the Peace Corps we conducted a research project in which we looked through the files of outstanding volunteers trying to find predictors of success. What we discovered was that better than any test score or other predictor was the use of certain words in the letters of recommendation. Those letters were usually favorable, whether about outstanding or merely average volunteers. But if, for example, the writer used the word "respect" as in, "I respect him" or, "She is widely respected," a word was being used that people apparently avoid using unless they really mean it. It was almost never applied to the average volunteers, and almost always used about the outstanding ones.

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WHEN WEBSTER HUBBELL'S wife, Suzy, asked him if he overbilled and he replied, "Yes, I did. So does every lawyer in the country," faithful readers of this column know that he was exaggerating only very slightly.

What intrigued me about the Hubbell tapes is their suggestion that what Hillary Clinton feared the billing records would reveal was that she, like her partners, was not above overbilling. For me, the most fascinating aspect of Whitewater has been trying to figure out what Mrs. Clinton was covering up. Reading every possibility at its worst, I can only see her guilty of the most minor sins.

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"WHY NOT A WEST POINT FOR police?" a reader asks in response to last month's "Tilting" item about the Gang that Couldn't Shoot Straight, a.k.a. the District of Columbia Police Department. At first, I dismissed the idea as wildly improbable, which of course it is. But it's also profound in that it dramatizes what needs to be done if we are to confront the twin problems of corruption and incompetence in the police forces of America. The smart criminal knows he can get away with it because too many cops are too dumb, too lazy, or on the take.

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KEN STARR AND HIS CREW SEEM increasingly demented. Hauling Susan McDougal around in chains, threatening to put her in jail a second time for essentially the same offense, threatening Webster Hubbell with more prison time for an offense that is rarely ever prosecuted all reek of prosecutors who have lost their sanity compass. It seems clear now that Starr's case will center on Clinton's lies about Monica Lewinsky. About that matter, I'm indebted to Russell Baker for reminding me of what H.L. Mencken said when the Kinsey Report came out in 1948: It just confirmed what he had always suspected, that everybody lies about his sex life.

"Everybody does it" may not protect Bill or Hillary Clinton when they meet their maker, but it does suggest the inappropriateness of criminal trials or impeachment. What makes sense to me instead is something like the congressional resolution of rebuke that Trent Lott proposed a few months ago. We the people can say we don't like the president's adolescent self-indulgence or his and her silly attempts to stonewall and cover up. But the resolution would dispose of the matter quickly and spare the White House and the country from continuing to be distracted from the important issues of governance.

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Buckley v. Valeo IS THE STUpid decision the Supreme Court made in 1976 that equated spending money with free speech. Many of us had hoped that a future court would overturn the decision. But that hope took a bad hit in April when, in the first test of Buckley in 22 years, it was upheld by the U.S. Court of Appeals for the Sixth Circuit. But the disaster was not total. One judge, Avern Cohn, noted in a concurring opinion: "It may be possible to develop a factual record to establish that the interest in freeing officeholders from the pressures of fund-raising so they can perform their duties, or the interest in preserving faith in our democracy, is compelling, and that campaign expenditure limits are a narrowly tailored means of serving such an interest."

Don't let the legal lingo put you to sleep. The message is important. It says that a properly presented case could win. ●

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The Monthly *is determined not to give up on finding big solutions to the health care problem. Everybody else seems to have decided on tiny incremental steps, which, worthy as they may be individually, lead along conflicting paths. That's why we ran the article in April by Eric Schnurer ("A Health Care Plan Most of Us Could Buy"), because we thought it presented a major solution that would solve the problem for the largest segment of the population, the middle class.*

But the working poor were left out of that plan. And the way they can be included, as they are not now in any program, is with the Canadian Plan, which we continue to favor above all others. It not only has the merit of universality, but also has a strong practical appeal to physicians who used to oppose it just because it sounded socialistic, but now realize that its freedom of choice of doctors offers them a better life than they're leading under the HMOs.

The Best Solution

Questions and answers on Canada's health care system

BY PAT ARMSTRONG AND HUGH ARMSTRONG WITH CLAUDIA FEGAN

How much does it cost?

There are various ways to answer the question of public health care costs. One way is to look at the cost of health care goods and services exchanged as a percentage of all goods and services exchanged — the Gross Domestic Product (GDP). In 1995, Canada spent 10 percent of GDP on health, compared to 14 percent in the United States. In 1995, Canada spent $2,049 per person, or about 55 percent of what Americans spent per person.

A much better way to look at the Canadian system is to focus on public costs and the share paid for from the public purse. In 1995, Canada's governments spent just under 7 percent of the GDP on health, a figure that is not very different from the 6.6 percent that comes from tax dollars in the United States. Although the proportion of public money spent in Canada and the United States is very similar, Canadians get much more for their health dollar and many more Canadians receive care from these public expenditures. This public money covers every Canadian for a wide range of services. In contrast, fewer than 30 percent of Americans are covered by government Medicare (13 percent), Medicaid (12 percent), and military (4 percent) care plans combined.

Another way to look at costs is to examine what individuals pay. For services covered by public insurance, most Canadians pay nothing. Unlike Medicare and Medicaid in the United States, there are no deductibles or user fees, no limits related to contributions or nature of the plan, no restrictions on which of the insured services can be used, and no means tests. For most there are no premiums to pay for basic care, only taxes.

Why does Canadian health care cost less?

The simple answer to the question of why Canadian health care costs less is that so much of it is publicly financed. Before medicare, there were no significant differences in what Canadians and Amer-

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icans spent on health care services. Since the introduction of the Canadian health care system (which they call medicare with a small "m"), the differences in expenditures have steadily and significantly increased. What the Canada Health Act calls "public administration" has kept Canadian health care spending under control while providing quality care to the entire population. There are several reasons why public administration makes for cheaper care. One of the most important areas for cost savings is in administration itself. When Larry Haiven was released from a U.S. hospital after his heart attack scare, he received an itemized bill, detailed down to the sample tube of toothpaste, the aspirin pill, and the laxative he didn't take. In Canada, Larry did not receive a bill at all after his first hospital stay with a real heart attack. The Canadian hospital had no reason to collect the kind of details he was later to receive from the U.S. hospital. It would have been wasteful to go to the trouble of allocating the cost of insignificant items like toothpaste tubes to individuals patients. Indeed, it would have been wasteful to allocate the cost of medications or surgical supplies to individual patients. Instead, the hospital simply purchases the supplies it needs and in turn provides them to the patients who need them.

Hospitals in Canada save on administrative costs not only because they do not have to keep detailed accounts for each patient, but also because they do not have to send each of them, or their private insurer, a bill. Moreover, Canadian hospitals do not have to send out these bills according to the different criteria and forms used by different insurers, do not have to worry about whether they can collect, and do not have to calculate how many "charity" cases they can afford to take on.

All this contrasts sharply with the situation in the United States, where, according to one study, hospitals "must keep more extensive records in order to facilitate billing to the state and federal governments, insurance companies and patients, and in anticipation of malpractice suits." Comparing hospitals in California and Ontario, this study estimated that "roughly half" the difference in hospital costs could be explained by higher administrative expenditures south of the border.

As one Canadian doctor who tried practicing in the United States explained, "I wasn't making any more money [in the United States]. My overhead was so much higher." He returned to Saskatchewan after two years in Idaho, not only because he made less but also because, south of the border, "People did not come until they were very ill," in order to avoid the expense of care. For example, this doctor could recall only one occasion during his 11 years of practicing in Saskatchewan when a leg had to be amputated because of complications with diabetes. It happened four times during his brief stay in Idaho.

Administration also costs less in Canada because no effort is required to separate the eligible from the ineligible. No time is taken up with means tests to determine who qualifies for Medicaid, or filling out forms to make sure applicants are old enough for Medicare. No time is spent ensuring that insurance coverage is up to date, that the right hospital is being used for a specific insurance plan, or that the required service is covered by that plan. Because all Canadians, and most health care services, are included in the public health insurance scheme, this kind of scrutiny to assess eligibility is largely unnecessary.

In the Canadian system, hospitals and doctors are not alone in enjoying light administrative loads. Patients also have much less paperwork to fill out than do their U.S. neighbors. Canadians sign up but once for medicare, receiving one identification card good for the entire range of services. This card is all they have to produce when they enter the hospital, visit the doctor, or use any of the other services available under their provincial program. There are no bills to juggle at the end of the month, no calculations to make about which insurance company to choose or to charge.

Is health better?

The most important measure of care quality must be health. As a mass of research makes clear, health is determined by a range of factors. The most critical are food, shelter, jobs, and joy. But health services also have an impact, so it is useful to look at the overall health of a population in assessing the quality of its health care services.

On such measures, Canada comes out ahead of the United States. Take babies, for example. More babies die in the United States. In 1994, six out of every 1,000 babies born in Canada died within the first year; this was the case for eight out of every 1,000 American babies born that year. In other words, out of every thousand babies born, two more died in infancy in the United States. Maternal mortality rates in the United States were double those in Canada in 1988, with seven out of every 100,000 dying in Canada compared to 14 in the U.S.

Canadians also live longer than their American counterparts. In 1995, for example, Canadian male babies could be expected to live for 75.3 years on aver-

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age, while male babies in the United States could be expected to live 72.5 years. Women in both countries can be expected to outlive men on average, but Canadian women have the edge. They are likely to live to be 81.3 years, compared to 79.2 years for American women. More importantly, Canadians have a better chance of living free of disability. By the late 1970s, Canadian women and men averaged 66 years of disability-free life. In the United States, both sexes averaged 60 years free from disability.

Can Canadians choose their doctors?

Individual Canadian patients and family physicians choose without outside interference who will be seen, how often, and by whom. On referral from a family physician, Canadian patients can go to any specialist or hospital, as frequently as medically appropriate and for as long as medically necessary.

Doctors too enjoy a wide range of choices and freedom from supervision. There is little restriction on where they locate. In fact, a recent court decision in British Columbia struck down a provision in the fee schedule that penalized new entrants to medicine if they chose to set up their practices in heavily served urban areas. In this instance, the problem appears to be too much individual choice in the public system, not too little. Physicians are guaranteed that their fees will be paid at the negotiated rate, and their activities are very seldom scrutinized. Usually the monitoring of physicians' fees simply takes the form of letters sent to a random sample of patients inquiring whether they visited a specific physician on a specific date. The fee-for-service system under which nine out of 10 Canadian doctors are paid allows them considerable choice about their hours of work and, ultimately, about how much income they will receive.

What about high-tech care — MRIs, organ transplants, etc.?

Although it must be conceded that the Canadian system is more equitable than the U.S. alternative, it is on occasion argued that the quality of care is inferior in Canada, especially when it comes to advances related to research and technology. As we have seen, measuring quality is no simple task, and neither country is very good at it. However, none of the research on quality reveals significant differences in the health care in Canada and the United States. Although there is relatively more technology in the U.S., there is little evidence that all of it is necessary or altered to improve care quality. There is, however, evidence that Canada distributes its technology more appropriately and equitably. Third, although neither country has developed rigorous ways of measuring quality, the establishment of well-funded research centers in Canada with mandates to focus on evaluation and utilization concerns may bode well for the future. The existence of a publicly administered health care system in Canada enhances the likelihood that research conducted there and abroad will be translated into improved care.

What if you get sick away from home?

It may seems obvious to point out that people can fall ill or have an accident anywhere, but this fact has quite important implications for health care coverage. Its recognition led those developing Canadian medicare to make portability a central principle of the system. Public health insurance coverage follows Canadians without a break from service to service, from job to job, and from province to province. It even provides some coverage outside the country.

Portability is not restricted to specific geographical areas. Increasingly, people commute long distances to work. Or they travel even longer distances at irregular intervals. Or they move for months, even years, to another location. Illness and injury do not necessarily occur near home, however, and often the need for health care cannot be planned. Like many of these people, Pat had moved out of Toronto for a couple of years. And like many of them, she needed health care while she was away. Her provincial health card from Ontario gave her immediate entry to the full range of services in Ottawa, her new home during these years.

Portability in this sense means moving throughout the provincial system. Because it is a public health system, people have access to the entire provincial system rather than to a single service organization or to a specific network of providers, as they usually are in managed care. This means that traveling for work need not mean moving away from access to paid care.

It also means that patients can travel to the services that are seen to be best for their needs. While she was living in Ottawa, Pat could still visit the specialist in Toronto who did her regularly required specialty tests, even though it was quite possible to find a new specialist in Ottawa.

This portability is particularly important for those Canadians who live in rural areas or small towns scattered throughout this enormous country. With portable insurance, they have access to medical services in major urban centers where a choice of specialists and a wider range of services are more likely

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to be found.

This portability of services within the province contrasts sharply with the American private system, which channels health care primarily through employment. This results in two major differences between the two systems. First, Canadians are much less tied to their employers through health care coverage. Although Canadian employers do offer some health care benefits, these are extra to the medically necessary services provided under the public plan. To change employers, then, does not mean sacrificing the right to necessary care. Choosing a new employer is not related to coverage for basic health care services. Nor need it be related to the kind of plan available or its conditions. Canadians therefore have more choice about moving from employer to employer as a result of their portable health care plan.

Second, work restructuring has little impact on health care in Canada. In both countries, employment has become more contingent, that is, more precarious, temporary, and insecure. A growing number of jobs are part-time, short-term, or simply insecure. A majority of this contingent work is done by women; women who in their middle years are much more likely than men to need regular health care. Yet only a small proportion of such workers are likely to receive health insurance as part of their employment contracts. With portability under the Canadian public plan, coverage is not linked to either employment or neighborhood, so Canadians have many more choices about services whatever their place of employment or indeed whether or not they are employed.

Problems

1. Waiting lists. Comparisons between Canada and the United States do reveal differences in waiting times for some kinds of surgery. In the case of knee replacement surgery, for example, Canadians waited significantly longer than Americans. While waiting for knee surgery may be inconvenient or even painful, it is unlikely to be life-threatening. It is not surprising then that only 15 percent of Canadians felt their waiting time was unacceptable for this surgery.

Canadians do not wait for care that is required immediately. Alice had her surgery booked in the doctor's office while she was assimilating the news of her diagnosis. Emergency rooms are readily available in all urban centers, and all patients urgently requiring care can be admitted without regard to ability to pay, health care plan, or place of residence. In rural areas, ambulances on the road or in the air can deliver patients quickly to emergency centers.

Surgery that is deemed medically necessary on an urgent basis is also done quickly. As a recent survey of the Canadian system put it, "in virtually all cases, Canadians who need emergency or urgent care receive it in a timely fashion; it is extremely uncommon for patients on surgical waiting lists to die." Indeed, there is no evidence that they are more likely to die than their American counterparts. There is, however, evidence to suggest that in the United States "the uninsured receive less trauma-related care and have a higher mortality rate." We can assume no such differences exist in Canada, given that everyone is covered for care.

2. Drugs. Canada does have a problem with drugs. Per capita spending on drugs increased by over 100 percent in real terms between 1975 and 1996, rising to $C 362 for every man, woman, and child. Drugs now account for more than 14 percent of all health care expenditures, virtually the same amount as that spent on physicians and second only to hospitals in terms of expenditure share.

One reason for this dramatic increase in the amount spent on drugs is that only three provinces have universal drug plans, and only British Columbia uses a reference-based pricing scheme to help control costs. In its first 10 month of operation, British Columbia saved an estimated $21 million by generally paying for only the lowest-cost drug in each of three designated "therapeutic categories." In consultation with physicians and pharmacists, the province is working to introduce more therapeutic categories to the scheme, but other provinces have not yet introduced similar approaches. Those provinces without universal plans have multi-payer systems that are comparable to those prevailing in the United States. With such systems, not only are many individuals left out, especially among the "working poor," but it is very difficult for any particular plan to control costs. At the same time, each of them faces unnecessarily high administrative costs. ●

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Bad Air

Cleaner vehicles are here — so why is the industry turning out gas guzzlers?

By Robert Worth

WALKING DOWN HARLEM'S 125th street is like stepping back into the history of black America. As you dodge past the vendors and musicians who line the curb near the Apollo theater, the street names alone conjure up a legendary past: Frederick Douglass, Adam Clayton Powell Jr., Malcolm X. But unless you live nearby, you're likely to notice something else first: the filthy air. Diesel trucks and buses charge along Harlem's great boulevard, belching out sooty, foul-smelling clouds of smoke. Six of New York's seven bus depots are north of 96th street, and trucks — barred from the West Side highway — thunder through the neighborhood at all hours of night and day. When EPA officials measured Harlem's air in late 1996, they found levels of pollution that exceeded federal air quality standards by 200 percent.

This kind of pollution is more than unpleasant. A growing body of medical research links the sooty particulates found in diesel fumes to asthma, lung cancer, and other respiratory diseases. These studies led the California Office of Environmental Health Hazards Assessment to issue a report in March officially declaring diesel exhaust a "toxic air contaminant." Meanwhile, gasoline exhaust remains a major health risk as well. A study conducted by a group of New York City doctors in 1996 found that the primary cause of asthma-related emergency-room visits was smog and soot from all motor vehicles — cars as well as diesel buses and trucks. That's not news to residents of Harlem, where asthma rates in some neighborhoods are 12 times the national average, and children die of lung ailments at rates far above the rest of the country.

Back when the U.S. environmental movement first started gathering steam 30 years ago, motor vehicles were a target for two reasons: They contributed to air pollution, and they weren't practical, because fossil fuel supplies were rapidly dwindling. The second argument melted away with the discovery of new oil reserves, and it's not likely to come back while gas remains as plentiful as water, and almost as cheap. (Actually, gas is now about a fourth the price of Evian.)

Yet the first threat has only expanded. In late April the Centers for Disease Control and Prevention reported that the number of asthma cases in the U.S. rose 75 percent between 1980 and 1994, while the death rate for children rose 78 percent, in part due to air pollution. Almost simultaneously, the EPA released a study suggesting that it could not meet its air quality goals without cleaner vehicles. It's not that we haven't already made progress; thanks to catalytic converters and other pollution control technology, the average vehicle of today is a lot cleaner than it was in 1970. But the four-wheeled population has literally exploded. The total number of vehicle miles traveled has almost tripled in the past 25 years, virtually erasing some of our achievements in pollution control. (In fact, emissions of nitrogen oxide — the main cause of smog —increased during that period.) Meanwhile, the threat of global warming is getting larger and more plausible every year. Motor vehicles play a major role, because the fossil fuel they burn accounts for the single largest portion of the man-made "greenhouse gases" that help to heat the atmosphere and may ultimately change the Earth's climate in catastrophic ways.

So why haven't we done more? Low emission cars are finally on the market, and they're not just electric go-carts anymore. Natural gas, a much cleaner and soot-free alternative to gasoline, has been an option for almost a decade. It's also cheaper than gasoline (despite higher upfront costs for

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converting fuel tanks), so it should be an obvious choice for owners of fleets, which constitute a large percentage of the traffic in smog-heavy urban areas. And it's starting to happen: The Postal Service now runs 7,400 natural-gas vans throughout the country, and UPS has almost a thousand. New York and other cities have begun converting taxis and buses and putting in public natural-gas stations that anyone can use. Meanwhile, technology for cutting gasoline-engine emissions and improving fuel economy has shot forward in the past few years. And most of the major automakers have electric vehicles on the road. California has reduced its vehicle emissions (and its smog problem) in recent years by encouraging these new technologies and mandating a low-sulfur gasoline that helps to keep even ordinary cars much cleaner.

Yet despite these advances, tailpipe emissions remain a major source of air pollution. Why? Follow the money. Ford now makes as much as $15,000 on every single Expedition it sells. Other companies make equally staggering sums on their sport-utility vehicles. Sport-utes pollute more and pose more danger to other drivers than any other class of cars, and they're the fastest-growing class of vehicles on the road. Thanks to their classification as "light trucks," they enjoy special tax breaks, protection from foreign competition, and much looser pollution standards than ordinary cars. "Americans love their trucks," says Barbara Kiss, staff engineer for the American Automobile Manufacturer's Association (AAMA). "We're just looking to make customers happy." But the automakers aren't quite the passive caterers they claim to be. They created the SUV market, pumping almost a billion dollars a year into advertising, when they saw how much profit the "light truck" loophole would bring them. Drunk on this windfall, the major automakers are finding new ways to game the fuel economy rules, and even looking to have them abolished.

Of course, sport-utes aren't just the creatures of corporate greed. They're popular because — why not admit it? — they're fun to drive. And with gasoline so cheap, car buyers who ask about fuel economy come off sounding like guests at a 1970s theme party. Nor do exploding asthma rates or global warming mean much when you're cruising down the freeway in a car the size of a tank, safely insulated from the worries of your fellow citizens. But you have to wonder: Should our government really be subsidizing that kind of fun at the expense of clean air?

The Sporting Life

When asked about air pollution, auto industry lobbyists will tell you that they're leading the charge. In January 1998 they finalized a set of voluntary regulations that will, they claim, make their new cars considerably cleaner. In fact, they'd like these new regs to take the place of the EPA's next scheduled round of tailpipe emission standards, which will be finalized later this year and are slated to kick in after 2004. "We just volunteered to make our cars 50-70 percent cleaner than 1994 models," one industry spokesman told me pitifully, "and now they're saying we may have to do more?"

What the car guys won't tell you is their new "voluntary" standards don't change the loopholes in the 1990 Clean Air Act legislation that permitted the sport-utility craze to bloom. Sport-utes are allowed to emit five and a half times more nitrogen oxides than cars, and to guzzle gas like tractors. The industry is opposing California's new effort to impose tougher standards on sport-utes, despite the fact that these vehicles are much more likely to be used by housewives in Carmel than the hay-hauling farmers on whose behalf the loopholes were written. In fact, sport-utes now constitute roughly half of all vehicles sold in the U.S. Amazingly, the automakers still cling to the excuse that sport-utes need special regulatory treatment. "We have to design it for the worst-case scenario," says Barbara Kiss.

Automakers are also in denial about global warming, which their 1998 emission standards don't acknowledge at all. According to a research paper presented last fall by an EPA official, sport-utilities and trucks will account for the biggest increase in greenhouse gas emissions by the U.S. over the next two decades, and present a significant obstacle to meeting the Kyoto global warming accords negotiated last December, under which the U.S. would reduce its greenhouse gas emissions to 7 percent below their 1990 levels over the next 15 years. In fact, sport-utes consume so much gas that even under the current lax regulations the big three are in danger of failing to meet their fleet average fuel economy standards. (And the biggest sport-utes don't even count in the average, because they're too heavy to qualify as "light trucks.") Recently automakers won fuel economy credits from the government for building sport-utes that can run on ethanol as well as gasoline, even though ethanol is almost impossible to find at filling stations. And a few months ago GM, in danger of failing to meet its fuel economy standards, pulled another stunt: It shifted its biggest sport-ute, the Suburban, into the 1999 model

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year. "That's a little like the Yankees moving all their losing games into next season, so they can win the World Series this year," says Daniel Becker, the Sierra Club's energy policy director.

Raising fuel economy standards for light trucks — as California has proposed to do — would put a big dent in our greenhouse gas emissions. Corporate Average Fuel Economy (CAFE) standards doubled between 1979 and 1985, thanks to the long shadow of the OPEC oil embargo. They've stagnated since then. The automakers say standards are as high as they can go, and raising them now would bankrupt carmakers. But that's what they said in 1974. And this time the excuse is even thinner, since the European divisions of Ford and GM have just agreed to produce higher-MPG models. "Now that we need to find ways to stop global warming, the first place to look is passenger vehicles," says Roland Hwang, transportation director for the Union of Concerned Scientists, "and the way to do it is with CAFE, because we know it works, and it's in place right now."

PHOTO COURTESY OF TOYOTA

Revenge of the Nerds: Toyota's E-Com

Meanwhile, the oil industry has embarked on a last-ditch effort to challenge the science behind global warming. They may not get far, since the scientific basis for global warming is getting stronger every year. But in late April *The New York Times* gained access to an ambitious draft proposal by the American Petroleum Institute outlining a wide-ranging opposition to last December's Kyoto accords. They've already gained some support in Congress, where Republicans have made a fuss about the fact that developing countries like China, which could soon be the Godzilla of polluters, have not signed on.

That's true. But it's also true that China is on the verge of a massive growth spurt in road-building and investment; their auto industry may soon rival ours. If we could show them that cleaner vehicles would make economic sense — as well as cut back their own growing rates of asthma and pulmonary disease — the whole world would benefit. If we can't, they're more likely to go with traditional, high-polluting technologies. If that happens, all bets are off on global warming.

California Rules

In the meantime, the U.S. auto industry will keep churning out gas guzzlers unless the EPA's new regulations force them to clean up their act. "That's going to be a big policy debate," says Mike Walsh, director of the EPA's air and radiation division from 1977 to 1981. If the EPA's proposal — due out in December 1998 — includes demands that they start manufacturing cleaner cars, we'll hear a loud chorus of the industry's favorite line: You can't force the market.

But they should know better. Both the catalytic converter (the single largest contribution to cleaner gas-powered cars in the past 30 years) and the safety airbag were created in response to regulators' demands. In each case the industry balked, but the engineers did the job in less time and for far less money than anyone — even the regulators — had expected.

That doesn't mean that carrots can't work as well as sticks. Last year New York state legislators passed a tax credit that helps taxi fleet owners pay for the higher upfront costs of switching to natural gas. "The next step is developing more incentives to encourage fleets and other high-mileage users to adopt alternative fuels," says Richard Kassel, a senior attorney at the National Resources Defense Council, which led a lobbying drive for the bill.

Some of the regulators' greatest triumphs have occurred in California, which has had a separate track on Clean Air legislation since 1973. In 1990 the California Air Resources Board (CARB) wrote emission standards that were considerably stronger than those in the rest of the country and demanded that carmakers start producing cars to conform to them. They also forced oil companies to cut the sulfur content of all gasoline sold in the state by a factor of 10, since lower-emission cars are very sensitive to sulfur. But the most startling new rule was a demand that the seven major automakers make 2 percent of their fleets emission-free by 1998. The percentage would rise to five in 2001, and 10 in 2003. In effect, this meant making electric cars, the only zero emission vehicles for the forseeable future.

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Predictably, the industry went berserk. CARB's demand was "technology forcing," they said; the regulators were way out of bounds. Nonetheless, the law was the law, and they went ahead — particularly GM, whose outgoing chairman, Roger Smith, had famously promised to put an electric vehicle on the market in 1990. GM executives winced, but the engineers honored Smith's promise. GM poured $345 million into a frantic engineering project that resulted, after five years, in a sleek "electric corvette" called the EV1 that could do zero to 60 in 8.5 seconds, all without making a sound or emitting a single noxious gas.

Of course, the EV1's short range and lengthy recharge time meant that the electric family car was still a long way off. But the mandate brought it a lot closer. And California's regulations also pushed automakers to bring a wide range of more practical low-emission vehicles to market. "In 1993 the big three said we cannot get to ULEV (ultra- low emission vehicles) with an internal combustion engine," says Sheila Lynch, executive director of the Northeast Alternative Vehicles Consortium. "Now Honda is already marketing a ULEV car, and all the other automakers are developing them." Honda is also marketing the first 50-state natural gas vehicle. Meanwhile, hybrid gas-electric cars are on the market in Japan and Europe and should reach the U.S. in a year or two. These cars suffer from none of the impracticality of pure electrics, because the engine (and the brakes, on some cars) recharges the battery continuously. Although they can be gassed up at any Texaco station, they cut down emissions drastically, and unlike other low-emission cars they cut carbon dioxide (the main culprit in global warming) by half. The Society of Automotive Engineers did a survey at a 1996 conference, and found that most engineers believe that hybrid vehicles will be 40 percent of the market within 10 years.

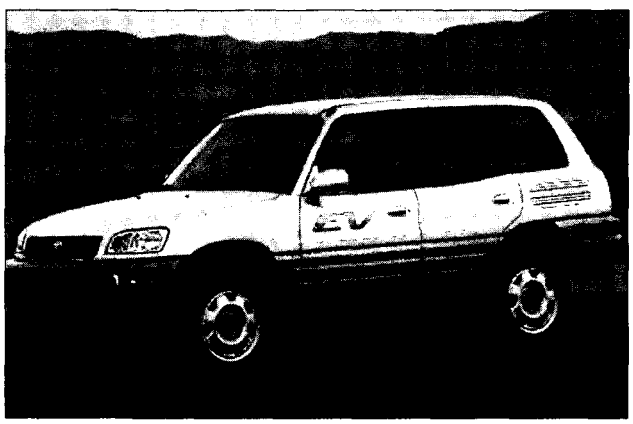

PHOTO COURTESY OF TOYOTA

No sport, utility: Toyota's electric RAV-4

Further down the road are fuel cells, which can serve as a kind of refillable battery for electric cars. They're still too expensive for passenger cars, but three prototypes are already in use on buses in Chicago. Unlike the current crop of electric car batteries, which are hefty and not really emission-free (because the power plants they rely on create smog), fuel cells will ultimately run on hydrogen, an unlimited natural resource, and release only water vapor as exhaust. It may sound like one of Al Gore's private fantasies, but auto engineers will tell you without blinking that the fuel cell is the successor technology to the internal combustion engine.

Inspired by California's move toward the new technologies, the 12 northeastern states and Washington D.C. began to lobby for their own tougher standards soon after the passage of the 1990 Clean Air Act. These states had a shared and worsening pollution problem, thanks in part to the borderless cloud of smog-forming ozone (not to be confused with the beneficent ozone layer high in the stratosphere) that hangs over the car-choked Eastern seaboard. (It's not all because of cars; drifting pollution from midwestern power plants is another problem.) During the summer of 1988 ozone levels in Maine's pristine Acadia National Park had risen "so high," according to congressional testimony, "that they would produce smog alerts if they occurred in downtown Los Angeles." Ten years later, "we have a lot of days when it's difficult to breathe here," says Sonya Hamel, director of air quality for the Massachussetts Department of Environmental Conservation. "There are 750,000 people in this state who have serious respiratory problems or are seriously affected by poor air quality." In 1993 the northeastern states began lobbying for a collective shift to California standards.

The automakers responded by stepping up their campaign against California's regulations. Sam Leonard, one of GM's top guns, had been influenced in college by Ayn Rand's novel *Atlas Shrugged*, in which a brilliant engineer developes a pollution-free vehicle but refuses to release it to a society obsessed with government regulations. As the engineers perfected the EV1, Leonard and his fellow lobbyists took their cues from Rand's novel, praising the car but fiercely protecting it from potential buyers (even today, with the car available to consumers, GM is widely accused of refusing to market it.)

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In 1995 CARB backed down and dropped its zero-emissions mandate for 1998 (though the 10 percent requirement for 2003 remains in place). But the big automakers weren't satisfied; they wanted to stop the northeastern states from accepting *any* of the California regulations. They proposed their own set of regs, which was tagged a "voluntary" new national standard (since EPA was explicitly forbidden in 1990 from creating new regs until 2004). Most of the states accepted the industry's new standard, known as NLEV, but New York, Massachussetts, Maine, and Vermont held out for something better.

As it turned out, the holdout states knew what they were doing. By the time NLEV was finalized in January 1998, cleaner technology had moved so much faster than the industry had predicted that NLEV "was already obsolete," says Sheila Lynch, who served on the Federal Advisory Committee to the EPA for the northeastern states. It did nothing to promote hybrid cars or cleaner fuels. It didn't require the low-sulfur gasoline that even the auto industry concedes was the main factor in California's successful emission reductions since 1990. And of course, the new standard didn't change the rules on sport-utes, the worst polluters of all.

The EPA may change that. Its latest report, which will be refined into recommendations for the post-2004 era by December of this year, specifically men-

Who's Who

By Susan Threadgill

Conservatives may still dominate the Congress, but their reign over talk radio appears to be in decline. According to the most recent surveys, **Oliver North**, **Michael Reagan**, and **G. Gordon Liddy**, are losing listeners. And, of course **Mary Matalin** was recently dropped. But the king himself, **Rush Limbaugh**, after losing listeners for a while, seems to have been revived by the **Monica Lewinsky** story.

Bob Barr, the leader of the impeach-**Clinton** movement among House Republicans, recently flew to Los Angeles to address the John Birch Society, the group that first gained public attention with its characterization of **Dwight Eisenhower** as a "dedicated, conscious agent of Communist conspiracy." The society's latest effort, according to *The Hill*, is "a video designed to expose the threat posed by the United Nations."

There has been a rumor going around that **Monica Lewinsky**'s mother is no longer happy with **William Ginsburg**. When a caller from *U.S. News & World Report* asked Ginsburg about the rumor, he asked, "Who told you that, **Marcia Lewis**?"

The Hill also reports that Rep. **Vic Fazio** is hoping to replace **Federico Peña** when Peña departs as Secretary of Energy at the end of this month. But the latest we hear is that the job will go to U.N. Ambassador **Bill Richardson**.

Democratic Sen. **Frank Lautenberg** and **Robert G. Torricelli** have been feuding, so Minority Leader **Tom Daschle** got them together for what he hoped would be a peace meeting. The two senators emerged from the meeting agreeing on one thing, according to **James Dao** of *The New York Times*: "Both have told friends that the session opened Mr. Daschle's eyes to how unreasonable the other guy could be."

Is it possible that **Arianna Huffington** has political ambitions? We, of course, would not presume to say, but "Inside the Beltway"'s **John McCaslin** tells us that someone recently approached her at a book signing at the National Press Club and said, "If you ever run for office, I'll work on your campaign." Huffington replied, "Let me have your card."

Al Gore's reputation as a techie and a reinventor of government may encounter a problem in the next presidential election. If the year 2000 glitch causes massive malfunctioning of government computers, as with missing Social Security checks, the problem will be hitting front pages just at the time of the crucial Iowa and New Hampshire primaries, a banking consultant recently pointed out to the *National Journal*.

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tions sport-utes as a problem, and a subsequent study paper highlights the gains to be made by moving towards California's cleaner gasoline standards. EPA officials won't comment on their intentions, but Mike Walsh says they're likely to push for tighter controls in both areas. They may well benefit from a splintering of the opposition. Ford and Chrysler, stung by Keith Bradsher's *New York Times* series on sport-utes last fall, announced plans in January to produce low-emission versions of their most popular light trucks. So the other automakers can no longer claim that they've reached the limits of technology. On the fuel issue, automakers are now pointing the finger at their old comrades in the oil industry. In a curious echo of the charges environmentalists used to level at him, AAMA President (and former Transportation Secretary) Andrew Card recently told Reuters, "It's clear that the time has come for us to bring cleaner fuels to the entire U.S. market, especially as automobiles are getting cleaner and cleaner in terms of their technology. It's not that it can't be done. It's being done in California."

Whatever the EPA decides in the next few months "could determine what kind of car you'll drive in the next century," says Roland Hwang of the Union of Concerned Scientists. Not to mention the kind of air your descendants will breathe, and even the climate they'll live in. That's why it's so important that the agency push automakers to stop feeding from the sport-utility trough, and start bringing some of the new technologies to market. Recently I had a chance to drive the Toyota Prius, a hybrid electric vehicle that goes 850 miles on a single tank of gas. I had expected to see a glorified golf cart. Instead it was a glossy blue sedan, about the size of my VW but roomier on the inside. As I turned the ignition key a blue computer screen glowed on the dashboard, showing an image of the car's two motors (electric and gas) which work in tandem to keep the car at peak efficiency. Even the brakes draw power from the rest of the system. I shifted into drive, spun out of the garage, and moved into the traffic. As I wheeled around Dupont Circle I waited for the shocked stares from passers-by — *It's the Vehicle of the Future!* — but no one seemed to notice. After a little while I almost forgot I was driving an ultra low emission car, except at stoplights, when the silence made me think I had stalled out. But that too began to seem pleasant; it was like gliding along in a well-protected glass-bottom boat. "I want to buy it," I told the Toyota spokeswoman sitting next to me. "Sorry," she answered, "but it's only on sale in Japan."

You may have heard that **Monica Lewinsky**'s employment agent, **Vernon Jordan**, and her new stepfather, **Peter Straus**, are old friends. But you may not

know that they once applied for a radio station license in Washington. The application was not granted by the FCC. According to **Marci McDonald** of *U.S. News & World Report*, the FCC was just a bit skeptical of "Jordan's claim that, after working a 40-hour week at his law firm and another 10 hours on his corporate boards, he intended to put in an additional 40 hours as the station's full-time program director." In fact the FCC said the claim, which was needed to justify minority offset credit for the application, was "incredible."

If you wonder why **George Bush** supports **Bill Clinton**'s position that the Secret Service should not testify against the president, former Bush White House counsel **C. Boyden Gray** offers this explanation: "He has probably told about a hundred dirty stories — off-color stories that the Secret Service has heard over the course of the years, which would be incredibly embarassing to him if they became public."

We won't embarass him by revealing his name, but a lawyer arguing a case before the Supreme Court last month may have diminished his chances for success by twice calling **Ruth Bader Ginsburg** "**Justice O'Connor**."

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Nice Work If You Can Get It

How Fannie Mae became Washington's biggest power player

BY MICHELLE COTTLE

WITH MORE THAN TWO YEARS yet to go in Bill Clinton's second term — assuming Reps. Burton and Barr fail in their impeachment crusade — the pundits are already speculating about what our 42nd president will do post-White House. Facing unemployment at the tender age of 54, Clinton is too young to be put out to pasture a la Ronald Reagan or LBJ, and a little too fond of the spotlight to retreat to the ivory tower of academia, as some have suggested. Diplomat, government adviser, and spokesman for a pet cause are a few of the higher-profile possibilities being tossed about, and a handful of Bill-watchers (this magazine among them) have predicted that Clinton, addicted to the glad-handing life of a politician, will make a run for the Senate. But in light of the excitement Bill's fund-raising techniques tend to generate among Republicans, hopping right back onto the money-grubbing campaign trail might be pushing his luck. Besides, after eight years of subpoenas, hairstyle jokes, and all-around public pillorying, dear Hillary deserves a break from the political viper pit. All told, President Clinton's shrewdest career move come 2001 might be simply to move his office across town and settle in at Washington's most prestigious rest home for ex-politicos and bureaucrats, more commonly known as Fannie Mae.

Chartered by Congress in 1938 as the Federal National Mortgage Association, Fannie Mae is a quasi-governmental entity whose central mission is to encourage home ownership by ensuring that the residential mortgage market remains well-funded. To this end, Fannie buys up mortgages from primary lenders such as banks and thrifts — thereby enabling those lenders to finance even more mortgages — then bundles the debts and resells them. (Thus, not only can investors buy shares in Fannie Mae, they can also purchase a piece of the mortgages the company has bought.) Originally a public agency, Fannie was transformed in 1968 into a "government-sponsored enterprise." As a GSE, the company is subject to congressional oversight and certain limitations on its activities, but it nonetheless is a privately operated, publicly traded, for-profit corporation charged with making money for its shareholders.

Over the last two decades or so, Fannie has developed an unofficial secondary function as a refueling station for bureaucrats and political operatives fleeing the trenches of public service. Fannie's management, like the corporation itself, comprises a rich blend of government and business. Just this April, profiles in *The Washington Post* and *Slate* magazine highlighted the political pedigree of outgoing Chairman and CEO James A. Johnson, whose pre-Fannie credentials include work for the Democratic party on five presidential campaigns and a stint as executive assistant to Vice President Walter Mondale. When Johnson announced his resignation from Fannie, none other than White House budget director Franklin Raines promptly announced that he was leaving the administration to succeed Johnson as chairman and CEO. Raines expressed regret over having spent only a year and a half as chief of the Office of Management and Budget, but explained that the invitation to head Fannie's financial empire was "a once-in-a-lifetime opportunity."

Indeed, a less-than-glamorous career move on its surface, scoring an executive post at Fannie Mae is recognized around establishment Washington as the equivalent of winning the lottery. Much of the draw

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has to do with the corporation's dual public-private nature. Although Fannie takes great pains to portray itself as just another market player — "We are *not* an agency," a staffer in the communications office politely but firmly reminded me — the corporation's GSE status conveys a number of financial benefits that give the company a formidable edge in the marketplace. Fannie is exempt from state and local corporate income taxes, has a $2.25 billion conditional line of credit with the Treasury, is excused from paying to register the mortgage-backed securities it sells with the SEC, and, thanks to the implicit government guarantee of its debts, is able to borrow money at well below market-rate. This last benefit was worth an estimated $4 billion to Fannie in 1995 alone, according to a '96 analysis by the Congressional Budget Office.

Fannie's financial advantages make it almost impossible for private firms to compete in the field of "conforming" mortgages (those that meet Fannie's credit standards and are valued at less than the federally set ceiling of $227,150). As a result, the only serious competition Fannie faces is from a similar, and much smaller, GSE known as Freddie Mac. Fannie is revered on Wall Street as a money-making machine: In 1997 — its 11th consecutive year of record earnings — the corporation turned a profit of $3.1 billion. The company controls one-fifth of the nation's residential mortgage market and boasts that, in terms of assets, it is the largest corporation in the country.

Far from being seen as mercenary capitalists, however, Fannie executives are beloved of philanthropy groups and the public alike, thanks to the company's (government-mandated) commitment to low-income housing, as well as the community and charity works it funds through the Fannie Mae Foundation. During his eight-year reign as chairman, Johnson was invited to head both the Kennedy Center and the Brookings Institution, earning him such monikers as "the face of the Washington national establishment" and "the chairman of the universe." (Now, compare these descriptions to the public labels Clinton currently enjoys as president, such as "The Big Creep" and, as Rep. Dan Burton affectionately dubbed him, "a scumbag.")

In addition to the prestige of working at the mortgage powerhouse, President Clinton would also appreciate the luxury accommodations afforded Fannie Mae executives — no small consideration for a guy accustomed to the Oval Office. The grounds and façade of the company's grand headquarters in northwest D.C. are more befitting an English estate than an office complex. Just across Wisconsin Ave. from Sidwell Friends School, Chelsea Clinton's upscale alma mater, the main building (Fannie occupies three) is modeled on the governor's mansion at Williamsburg, Virginia — only greatly expanded, the Fannie folks informed me. A stone fountain gurgles in the center of the circular driveway, gardeners tend the flowering trees and shrubs in the twin courtyards, and, on rainy days, a gracious young guard in a crisp tan uniform meets visitors at their cars or cabs with a giant green-and-white "Fannie Mae" umbrella and escorts them into the lobby. The interior is equally swank: expansive executive offices with plush carpets and mini-fridges, an executive dining room replete with bow-tied waiters, and, for company meetings, a cavernous "grand hall" decorated with chandeliers and sand-colored sofas and ottomans. Security is paramount: Electric card-readers guard the entrance to various sections of the complex, such as the consumer information center and the trading floor. (Fannie runs a full-fledged trading bullpen like on Wall Street, only "much less stressful," one of the traders assured me.) As one government visitor put it, "It's beautiful. It's quiet. Everybody is smiling. It's like being in a big, fancy law firm."

Then, of course, there's the money. In the area of compensation, Fannie's top managers enjoy the best of both the public and private sectors. The company's bottom line is significantly boosted by the government subsidies it enjoys, but, unlike public agencies, the company is not bound by government salary caps — meaning big profits translate into big paychecks. James Johnson was recently dubbed the $7 Million Man in honor of the estimated $7.2 million he earned at Fannie in 1996. Other execs receive similarly sweet deals. Last year, Fannie President Lawrence Small earned $703,656 in base pay; a $1,002,710 bonus; "other annual compensation" valued at $35,344; as well as long term stock options and awards valued at a couple of million. The company's third highest-paid employee, Vice Chairwoman Jamie Gorelick, didn't join Fannie until mid-year but still managed to pull in $877,573, excluding long-term earnings. To put all this in perspective, consider that, in annual compensation alone, Fannie Mae's No. 2 guy, Lawrence Small, makes more than the entire Supreme Court. And soon-to-be Chairman Raines' annual income will run considerably more than those of the president of the United States, the vice president, and all of the Cabinet secretaries combined. (Quite a step up from his OMB salary of $150,000.)

With this kind of money involved, Fannie would seem to have obvious appeal to an out-of-work politico with a daughter in college and several million dollars in legal bills. Perhaps even more important, Clin-

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ton would feel right at home with the coterie of political and government expatriates now among the ranks of Fannie's senior management: In addition to Gorelick, who was Clinton's deputy attorney general, Executive VP Ann Logan was once staff director of the Senate Judiciary Committee; Senior VP John Buckley served as press secretary to Rep. Jack Kemp and as communications director for Bob Dole's presidential campaign; Senior VP William Maloni is the former senior congressional liaison for the Federal Reserve board of governors; Senior VP Thomas Nides was chief of staff to Trade Representative Mickey Kantor and, before that, executive assistant to House Speaker Thomas Foley; and, of course, Franklin Raines just finished up at OMB.

Arguably, any of these people could have gone into equally lucrative careers at lobbying firms, consulting firms, or some other private practice, a point the company stresses in its shareholder proxy statement: "... Fannie Mae's Board of Directors has adopted a compensation policy designed to help the corporation compete with other large sophisticated financial services companies for the talent Fannie Mae needs." But Fannie Mae is *not* just another financial services company. Fannie's enormous profits, and thus its ability to reward its executives so richly, come compliments of the federal government. (An estimated 40 to 50 percent of Fannie's net income is the result of retained subsidies.) According the the CBO's numbers, of the $4 billion in savings the company enjoys because of its ability to borrow money so cheaply, $2.5 billion is passed along to homeowners in the form of lower mortgage rates; the other $1.5 billion goes into the pockets of shareholders and executives.

Should President Clinton not want to commit to a full-time job at the corporation, he could always shoot for a seat on the board. There, one's business pedigree is even less important than political connections, particularly among the five presidentially appointed directors. Members currently serving at Clinton's behest include both the chief of staff and a deputy campaign manager for the president's 1992 campaign, a former White House aide, a hotshot DNC fund-raiser and erstwhile Lincoln bedroom guest, and a prominent GOP real estate developer from Los Angeles who crossed party lines in '92 to endorse Clinton. And although the financial windfall board members enjoy pales next to that of senior management, it's still a nice way for a president to say "thank you" to a political ally: Each director receives an annual retainer of $23,000, plus $1,000 for each board or committee meeting attended, and an additional $500 for each meeting he or she chairs. (Directors who participate by phone receive $600 for their troubles — $900 if they chair the meeting.) Each board member also gets tens of thousands of dollars worth of stock in Fannie Mae.

Preserving the Perks

Assuming Clinton would be interested in joining the Fannie family, the next obvious question is: Is he qualified for a job in the world of high finance? Eminently. As Fannie's management line-up suggests, though financial credentials are a plus, executives with political connections are equally valuable to the corporation. A primary responsibility of the company's top people is to lobby their political pals and former colleagues on behalf of Fannie's government perks. Shorty after Jamie Gorelick's move to Fannie was announced last year, *The American Banker* remarked that the soon-to-be vice chair was "well-versed in the ways of Washington" and that "Ms. Gorelick plans to mix diplomacy with resolve to fight for Fannie Mae on Capitol Hill." Likewise, while James Johnson was considered a perfectly competent financier and manager, he was a recognized master at, as *The American Banker* recently put it, "promot[ing] Fannie Mae in the public realm."

Of course, almost all corporations have an interest in getting their issues addressed in Washington. Fannie's GSE status, however, puts the company in a uniquely vulnerable position that would make Clinton's storied charm, schmoozing skills, and political savvy of particular value. Every few years — most recently in 1996 — some spoilsport on the Hill decides that, considering how profitable Fannie Mae has become, there's really no reason the corporation should continue to receive a multibillion-dollar subsidy. The company was originally created to support a market that the private sector was neglecting and, in return, was awarded certain privileges. Sixty years later, however, the mortgage market is thriving. Private providers handling the loans too big or too risky for Fannie are becoming evermore efficient, and the growing sense is that Fannie, as one industry representative put it, "is beginning to place a stranglehold on the market." Or as market analyst Tom LaMalfa asserts, "These guys are the robber barons of the 20th century."

A few concerned lawmakers have also noted that, even though Fannie must explicitly state that its debts are *not* guaranteed by the federal government, investors and lenders alike treat the GSE label as just such a guarantee — perhaps not an unreasonable assumption considering that Uncle Sam bailed out the gov-

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ernment-sponsored Farm Credit System in 1987, and provided financial aid to Fannie when it faced insolvency in the early '80s. Moreover, as the undisputed ruler of the nation's $4 trillion home mortgage market, Fannie already falls into the "too big to fail" category of American business, that elite group of players so dominant in their particular industries that the government cannot allow them to collapse for fear of the resulting market disruption. (Think Chrysler circa 1980.) Fannie boasts that it is the second largest borrower in the nation, just behind the U.S. Treasury, and its regulatory guidelines permit the company to maintain a lower capital-to-debt ratio than banks and thrifts. In the event that the corporation suffered a financial meltdown, taxpayers would likely be presented with a billion-dollar bailout bill reminiscent of the good ol' S&L days. Fannie Mae is in the enviable position, House Banking Committee Chairman James Leach has noted, of enjoying "the privatization of profit, coupled with the socialization of cost and risks."

Were Clinton to sign on at Fannie Mae, then, a significant part of his duties would be to keep Congress and the administration convinced that — far from conveying an unfair market advantage or posing any kind of risk to taxpayers — keeping Fannie on the GSE gravy train is in the best interests of everyone. (This, despite the CBO's findings that a third of Fannie's government subsidies go to fatten company profits.) Fortunately, tips on how to keep Fannie in the good graces of Congress and the community abound. James Johnson's many methods included hosting political fundraisers for key lawmakers, opening branch offices in key congressional districts, and presiding over the Fannie Mae Foundation's philanthropic efforts — all with great fanfare, naturally. The foundation doles out about $25 million annually in "Community Outreach grants" and sponsors such high-profile charity events as the annual Help the Homeless Walkathon (led last year by Gen. Colin Powell) and the "Home Team" partnership in which foundation volunteers and pro basketball stars join forces to build houses for needy families.

Of course, Fannie also knows the value of direct cash transfers to legislators. During the 1995-96 election cycle, Johnson personally gave to the tune of $30,000, according to the Center for Responsive Politics, while the corporation itself made $158,000 in soft money donations. Granted, it probably would take Clinton a few months to get used to handing out money rather than soliciting it, but at least he's familiar with the basic drill.

Wielding a carrot-stick combination has proved particularly successful for the corporation in making its voice heard. For instance, in 1993, '94, and '95, D.C. officials publicly broached the subject of requiring Fannie Mae to pay corporate income taxes like other companies — supplying D.C. an extra $300 million or so a year by their count (see sidebar). At least once, legislation was introduced, and a handful of council members signed on to the crusade. Faced with such threats to its bottom line, however, Fannie promptly ratcheted up the foundation's philanthropic efforts, contacting community groups and pledging to invest more in local housing efforts and youth programs. At the same time, company executives began publicly musing about how tragic it would be were tax pressures to "force" the corporation out of the District.

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In addition to helping keep Fannie Mae's GSE perks, Clinton would most likely be recruited to lobby for new ways to maximize profits. The corporation obviously has no interest in allowing competitors into its market, and so was understandably miffed when HUD Secretary Andrew Cuomo recently began pushing to raise the value of mortgages that can be insured by the government-run Federal Housing Administration. Concerned that this would cut into its business, Fannie has lobbied against such a move — thus far effectively. But Cuomo remains determined, and an administration proposal is now before a congressional committee. Should Cuomo retain his post in 2001, Clinton might be the perfect person to lobby his former appointee against such efforts.

The president might also prove successful in helping Fannie broaden its range of business activities. Having dominated all portions of the market in which it may compete, Fannie Mae must find ways to expand its operations or soon face a slowdown in growth. Already, private-sector players are nervous about the corporation's plans to extend its reach into subprime lending (mortgages that don't meet ideal credit stan-

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dards) and rumblings that Fannie intends to enter the home-equity business. As one industry watcher noted, "These are markets that developed just fine without government subsidies, and the participants don't want to see a government-sponsored enterprise come in and take over." Just last year Fannie attempted to expand into the life insurance field, offering policies free to home buyers and making money through fees paid by insurance companies. Concerns were raised about how Fannie's entrance into the market would affect private competitors, and about the ability of Fannie's primary regulator, the tiny Office of Federal Housing Enterprise Oversight, to monitor the mammoth corporation as it spread into new areas. Fannie pitched the move as more of a public service than a business decision, only to be publicly embarrassed when an internal memo was leaked to the press portraying the effort as a way for Fannie to expand its profits exponentially — decidedly bad PR for a company that likes to invoke its social "mission" as a way to justify its subsidies. Fannie says the memo was simply a first draft and that later estimates showed the plan to be less profitable. Nonetheless, the plan was killed during the 1997 budget battle in Congress — one of Fannie's rare defeats on the Hill.

Scared Silent

Considering the political nature of Fannie's business, the genius of its hiring strategy is clear. While most companies have to worry about choosing executives to manage business risks, the biggest threat Fannie faces is that an act of Congress will take away its GSE status and, thus, its license to make money. As such, tempting former political and government folks into the fold with visions of posh offices, political and

Sadly, our nation's capital has come to embody the old adage: It's a nice place to visit, but I wouldn't want to live there. Crime is rampant, the streets are a mess, the schools are falling down, the water is barely fit for consumption, and most residents consider themselves lucky if their garbage gets picked up at all. So what needs could the District start addressing with an extra $300 million* a year in tax revenue? Among other things:

Resurface severely potholed local roadways:	$62 million
Modernize the plumbing in schools:	$14 million
Replace boilers in schools:	$14 million
Upgrade electrical wiring in schools:	$28 million
Remove asbestos from school facilities:	$4 million
Rehabilitate decrepit police stations:	$10 million
Repair fire department and emergency medical service facilities:	$10 million
Replace/repair defective firefighting protective equipment:	$1.5 million
Replace/update computer-assisted emergency dispatch system:	$4 million
Rebuild/restore Fire-EMS training facility:	$7 million
Get 17 more ambulances on the streets/increase staffing efficiency:	$11 million
Hire 150 additional teachers (salary costs):	$6 million
Hire 100 additional police officers (salary costs):	$4 million
Upgrade computers to deal with the year-2000 problem:	$44.5 million
Payment toward the $3.32 billion in long-term debt the District carries:	$80 million
	$300 million

When past proposals to have Fannie pay local income taxes have been introduced, the company has made noises about moving out of the District. This kind of pseudo-blackmail, however, could be dealt with in kind: Fannie would be unlikely to head for the suburbs were Congress to suggest that such a move would prompt serious review of Fannie's GSE status and the more than $4 billion in savings it brings the company each year. Come to think of it, maybe having Fannie pay $1 billion in "user fees" in exchange for those subsidies would be an even better idea.

*By other estimates, even were Fannie subject to local taxation, only the portion of profits directly attributable to its operations in D.C. would be taxed here, with the remainder taxed in the other cities where Fannie does business. This would give the District closer to $40-$60 million, depending on who you ask. Still, $40-$60 million is nothing to sneeze at, and surely the other cities in which Fannie operates could find equally worthy uses for a little additional revenue.

Sources: Office of the D.C. Chief Financial Officer, the AFT, The Washington Times, and management reports commissioned by the D.C. financial control board.

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market clout, and seven-figure incomes is smart business. Indeed, Fannie Mae has learned how to manipulate Washington's famed revolving door better than most purely private corporate giants. (Franklin Raines and John Buckley are on their second tour of duty, having worked at Fannie, gone into political jobs, then returned to the company.) The cyclical nature of the system is magnificent: Fannie uses its government-subsidized profits to snag former political and government folks, then sends them out to make sure the corporation retains the government-sponsored perks that provide for those subsidies/salaries.

But here's the best part: No one seems to mind. No matter how richly the company profits from its subsidies, no matter how hard it lobbies to keep out competitors, no matter what plans it makes to muscle in on other segments of the industry, Fannie retains an approval rating even Clinton would envy. It appears that, through its philanthropy, its community involvement, and its low-income housing commitments, Fannie Mae remains one of the most popular organizations in D.C. Even staunch anti-government GOPers are strangely silent when it comes to the corporation — thanks in no small part to Fannie's bipartisan approach to both its hiring and its financial largesse. (*The Washington Post* reported that in 1996, after House Republican Richard Baker started agitating for hearings on Fannie Mae's GSE status, Johnson hosted a campaign fund-raiser at his home for Baker. When the hearings at last began, they focused on Congress' oversight of Fannie rather than on the privatization issue. Johnson assured the *Post* that the timing was coincidental.) "Fannie buys these guys off," says Tom LaMalfa. "There's no one important on the Hill who hasn't gotten a big check from Fannie."

In reality, it is fear as much as love that keeps potential Fannie critics silent. The company is famous for its vindictiveness toward those who cross it, with perhaps the most oft-told story being Fannie's decision to stop doing business with investment powerhouse Salomon Brothers for a period after folks at Salomon spoke out against Fannie's operations. No one in the mortgage business wanted to be quoted for this article, and many didn't want to speak even off-the-record. "You'll have to find someone who has nothing to lose," an executive at one mortgage company demurred.

Policy makers are equally hesitant to displease Fannie. In addition to outside lobbyists, the company keeps a cadre of its own people up on Capitol Hill monitoring both sides of the aisle. (During the first six months of 1997, Fannie reported $2,460,000 in lobbying expenses, earning it the No. 36 spot on the Center for Responsive Politics' list of top spenders.) If somebody does something the company feels is undercutting it, Fannie mobilizes mortgage bankers, real estate agents, securities dealers, and homeowners all across America to put pressure on the offending party, say staffers (all of whom, incidentally, asked not to be quoted). "Fannie has the Congress cowed," says Charles Lewis, the head of the Center for Public Integrity. "They are arguably the most powerful special interest that lawmakers encounter." In 1995, when House Banking Chairman Leach proposed having Fannie Mae pay "user fees" for the maintenance of its subsidies, the veteran congressman got steamrolled. Fannie mobilized its lobbying forces and threatened to pass along all costs to homeowners in the form of higher rates. Leach was forced to withdraw his proposal, explaining, "Fannie Mae and Freddie Mac — its duopolistic partner — have ties to Congress which are much stronger than those of 13,000 financial institutions in the 50 states."

Fannie keeps a close eye on the media as well. Press attention tends to make the company unhappy — unless, of course, reporters are covering one of the foundation's PR events. No scrap of information is released by Fannie, or its foundation, without the requester first undergoing a thorough grilling. And when the *Monthly* tried to arrange interviews with company executives, we were informed that Fannie has "a low tolerance for these sorts of articles" and that this reporter would not be allowed to speak with top management, particularly "in light of the murderers row listed on your masthead." (In recent years, two former *Monthly* editors have written pieces criticizing Fannie.)

The end result of all this is that Fannie essentially operates without any meaningful checks on its behavior. The company is not a "bad guy" per se. Over the years, Fannie has helped raise the level of home ownership dramatically, and more recently has been working to improve its record in providing a market for low- and moderate-income housing. But the corporation has grown so big, so rich, and so powerful that it is largely beyond the control of both government regulators and free-market forces. No industry players can influence it through competition. Certainly no one on the Hill dares speak out. "What's so interesting is not only that they have preserved their cushy arrangement," says Charles Lewis, "but that there is no discourse on the subject — not just in the halls of Congress, but even intellectually. It's a whole area that's been relatively ignored."

This, of course, suits Fannie just fine. And Bill Clinton would clearly be a top-notch recruit to help the corporation keep things that way.

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March Madness

How the primary schedule favors the rich

By Walter Shapiro

A SMALL BOAST: I HAVE PERFECTED A question guaranteed to prompt gape-jawed puzzlement from would-be presidential candidates of both parties. I have not been inquiring about knotty policy conundrums like the economic implications of the Euro or Medicare financing formulas for teaching hospitals. Nor have I invaded marital privacy with one of those snarky have-you-ever queries so favored by the character cops on the political beat. Rather, my question is directly relevant for any long-shot dreamer who fantasizes about taking the oath of office on Jan. 20, 2001.

Here's what I ask: Do you worry that the primary calendar is so rigged that only the best-financed candidates have a shot at winning a presidential nomination? John McCain, the press pack's favorite Republican, confessed that he hadn't thought about the question. Nor had liberal maverick Paul Wellstone on the Democratic side. John Ashcroft, who seems to be the self-appointed candidate of the unborn, ruefully admitted, "It takes wiser heads than mine to figure it out. We've got to play by the rules that they've set up."

Ashcroft talks as if these rules were set down by the Marquess of Queensberry to add a note of gentlemanly fair play to the rough-and-tumble of political combat. In truth, the primary schedule resembles nothing so much as the Mad Tea Party from "Alice in Wonderland." Both parties are likely to select their nominees in 2000 under a hyper-compressed, warp-speed timetable that only money-talks front-runners like Al Gore and 15-year-old computer geeks with joy sticks could possibly love. I know it seems bizarre to brood about the dates for the primaries more than 18 months before the Iowa caucuses, especially with our campaign-finance laws in tatters and the political mood as ugly as the Jerry Springer Show. But I am convinced that the primary calendar, more than any other single factor, unfairly dictates outcomes.

As recently as 1992, the primaries meandered from New Hampshire in mid-February until California in early June. Bill Clinton, for example, uttered his famous I-didn't-inhale puffery in an April TV interview on the eve of the New York primary and didn't silence the doubters in the Democratic Party until he nailed down California. OK, the dour Paul Tsongas, Clinton's last mainstream rival for the nomination, did not survive the daunting gauntlet of mid-March primaries known as Super Tuesday. But this long march to the nomination gave the voters and the press more than enough time to take the measure of Clinton's talents and character, even though some of us may regret our seal of approval.

For reasons that in hindsight defy rational analysis, the GOP establishment in 1996 was determined to nominate septuagenarian Bob Dole or the owlish Phil Gramm. With the Democrats preoccupied with White House coffees, Republicans were free to concoct a cock-eyed rush to judgment, encouraging states to cluster their primaries and caucuses in March. The unspoken logic was to dispense with the messy uncertainties of democracy and coronate a nominee by St. Patrick's Day. California Gov. Pete Wilson, with White House ambitions of his own, joined in this mischief by moving his state's primary to late March. The Republicans held 37 primaries and caucuses, which selected more than 70 percent of the convention delegates, in just five weeks from Feb. 20 to March 26.

Once Gramm dropped out after Iowa, having already lost the Louisiana caucuses that the Texas senator thought he had rigged, Dole was the inevitable nominee. Even though the Bobster stumbled in Iowa and was upended by Pat Buchanan in New Hampshire, Dole was the only remaining candidate who boasted both the financial and organizational

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resources to compete over this dizzying terrain. Just 11 days after New Hampshire, with news magazines trumpeting Buchanan's petulant populism still on the coffee tables, Dole became the de facto nominee after sweeping the South Carolina primary.

I recall sitting in an impromptu press room set up in a hotel bar in Columbia, S.C., watching Steve Forbes, Lamar!, Buchanan, and Dole debate right before the primary. The four-way face-off was fast-paced, substantive, and revealing — the kind of event that cried out for a month of sequels. Then, whap, the race was over. When politics outruns even the CNN-style 24-hour news cycle, there is no longer time for reporters to etch delicate candidate portraits, delve deeply into campaign issues, or muse on the political diversity of America. All I managed after New Hampshire were a few hasty columns on the Republicans written on my lap on a campaign plane flying between Who-Can-Remember and God-Knows-Where.

After two decades of trying to live out my childhood Teddy White fantasies, I am sadly accustomed to a cynical political culture that drains content out of campaigns for the voters and the press. But the stacked deck of the breathless primary schedule is worse — it destroys the logic of letting the voters, rather than the party leaders, select the nominee. As Larry Sabato writes in *Toward the Millennium*, a collection of essays he edited on the 1996 campaign, "Front-loading amplified the advantages of the front-runner, leaving little time for his opponents to regroup after the inevitable setbacks." Republican voters in Iowa and New Hampshire performed their proper function by highlighting Dole's weaknesses as a candidate, but the blink-and-it's-over calendar then deprived the GOP of an alternative.

This quadrennial March Madness is particularly cruel to underfunded underdogs because it eliminates what political lingo calls "the reload factor." When a broke but determined Gary Hart stunned the touts in 1984 with a stretch-run victory in New Hampshire, he was able to turn this media acclaim and momentum into campaign cash that fueled his insurgency until the Democratic convention. Had Lamar Alexander, plaid shirt and all, been the surprise 1996 victor in New Hampshire (he finished third in a closely packed field), he wouldn't have even had time to cash the post-primary checks before he was driven out of the race. Under the rules that prevailed in 1996, a candidate needs to raise upwards of $30 million before New Hampshire to have a chance of holding his arms aloft in triumph at his party's convention.

Granted, there is no reason beyond inertia, a never to be underestimated force in politics, why the primary timetable in 2000 must be modeled after the 1996 GOP demolition derby. While nominating Dole amid the syncopated sound-bits in San Diego, the Republicans belatedly conceded the error of their ways by awarding bonus delegates in 2000 to states that hold primaries and caucuses after April 1. A few states have already wisely sounded retreat — Wisconsin, Minnesota, and California among them. (The situation in California is muddled by its bizarre new open-primary law, which may force the state to choose its delegates by the old-fashioned convention system.)

But this small outburst of scheduling sanity is tempered by the irresistible pay-attention-to-us boosterism of states neglected by fly-over primary campaigns. Four small Western states (Utah, Wyoming, Idaho, and Nevada) recently formed a task force to set up a new regional primary in (guess when?) early March, and Arizona and Colorado may join this home-on-the-range alliance. Utah Gov. Mike Leavitt reflected the pressures of front-load fever when he said, "As a function of circumstances, the West has been left out of picking the leader of the free world." Adding to the fast-forward frenzy is the likelihood that politicians will move up primaries in a few states for tactical advantage, as Al D'Amato did last time for Dole in New York. D'Amato was, in fact, such a shameless string-puller that no other Republican was even allowed on the Soviet-style primary ballot.

The two national parties could, in theory, create an orderly sequence of primaries by either enacting explicit rules or simply pressuring governors and state legislatures to fall in line. But the Democrats' lack of interest in helping create a rational primary calendar is a signal that the fix is in for Gore in 2000 — and like it or lump it, Bill Bradley, Dick Gephardt, John Kerry, Bob Kerrey, and Paul Wellstone.

President Clinton, piously justifying his unrepentant political buckraking last fall, declared, "I have always been for changing the system. I'm just not for unilateral disarmament." GOP Chairman Jim Nicholson has frequently used the same hackneyed Cold War imagery to explain his party's unrelenting opposition to the McCain-Feingold campaign reform bill. Reforming the presidential primary system is an easy way to lessen the big-money arms race in politics without forcing either party to forsake any partisan advantage. It needs neither congressional legislation nor an FCC ruling. All it requires is for both parties to briefly forsake their habitual cynicism in the name of giving the voters a true voice in selecting the presidential nominees in 2000.

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In Search of Fairness: A Better Way

UCLA shows that class-based affirmative action won't lead to a "whiteout"

BY RICHARD D. KAHLENBERG

EVER SINCE RACIAL PREFERENCES WERE outlawed at public universities in California and Texas, the news on minority admissions at the elite public universities has been uniformly bleak. African-American, Latino, and Native-American admissions plunged among undergraduate institutions, and graduate schools saw even larger drops. Some conservatives have pointed out that the declines are proof of how deeply racial preferences had become embedded, but most Americans look at the declines with dismay: majorities don't like racial preferences, but they don't want all-white universities either.

Nathan Glazer, writing recently in *The New Republic*, argued that there is an irreconcilable conflict between principle (not judging people by skin color) and practicality (getting a racially diverse student body). In a reversal of his earlier view, Glazer now says we must resort to distasteful means in order to avoid distasteful ends (a "whiteout"). Some other conservatives fear that the dramatic decline in minority admissions will lead universities to abandon the use of standardized tests like the SAT and LSAT — and that we should stick with racial preferences as a small accommodation to racial politics rather than jettison meritocracy altogether.

But are we really faced with such Hobson's choices? What if we devised a system of admissions that was truly just, looking at academic records in the context of obstacles that individuals had overcome? It might not be fair to give Vernon Jordan's offspring a preference because they happen to be black, but why not give a leg up to disadvantaged kids of all colors, when they have done fairly well despite numerous disadvantages? A disproportionate percentage of disadvantaged students are people of color, and surely one of the central reasons minority students as a group do worse on average academically is because they face the additional obstacles that come from economic deprivation. Alas, this won't work, Glazer says: considering merit plus obstacles doesn't yield much racial diversity, "if the studies are to be believed."

Two of the most widely discussed studies of need-based or class-based affirmative action are Harvard professor Thomas Kane's study of undergraduate admissions and University of North Carolina professor Linda Wightman's study of law school admissions. Both are pessimistic about the possibility that class-based preferences — as defined by such factors as parental income, education, and occupation — will yield much racial diversity. The problem, they both note, is that while blacks and Hispanics are disproportionately poor, poor and working-class blacks and Hispanics test worse on average than poor and working-class whites and Asians.

Kane and Wightman are correct on this limited point, but they fail to probe why this disparity exists. One important reason is that looking at standard indicators of socioeconomic status (SES) — income, occupation, and education — does not fully capture the differences, in the aggregate, between black and white economic status. Three other differences turn

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out to be important.

One is concentration of poverty. Sociologists know that it is a disadvantage to grow up in a poor family, but a second, independent disadvantage to grow up in neighborhoods with concentrated poverty, because such children often lack positive role models and peer influences. Because of housing discrimination, blacks are much more likely to live in concentrated poverty than whites of equal income. Indeed, one study found that in Los Angeles, affluent blacks making between $75,000 and $100,000 live in neighborhoods with higher mean poverty rates than whites with incomes in the $5,000-$10,000 range.

A second important difference between blacks and whites of the same income level has to do with differences in wealth. While median black family income is on the order of 60 percent of white income, median black net assets are 9 percent that of whites. Middle class blacks earning $45,000-$60,000 annually have a lower net worth on average than whites with incomes between $7,500 and $15,000. Family wealth affects a child's life chances in a number of ways. To take one concrete example, a study reported recently in *The Wall Street Journal* found that blacks are less likely to take LSAT preparation courses, which run as much as $1,000. For the average black, whose net worth is one-tenth the average white's, the cost of the LSAT course is the equivalent of $10,000 in white eyes.

A third important difference between blacks and whites of equal income levels has to do with family structure. The main reason it is a disadvantage to grow up in a single-parent family is that the family is likely to be low income. But studies find a second, independent disadvantage stems from growing up in a household with half the number of parents to nurture you. Again, this factor has a racial dimension: Among children under 18, 76 percent of whites but just 33 percent of blacks live with two parents.

What would happen if a university's class-based affirmative action program looked beyond just income to factors like concentration of poverty, wealth, and family structure? We now have some preliminary evidence from UCLA Law School, which implemented a race-blind, class-based affirmative action system last year. According to a forthcoming article by UCLA Law Professor Richard Sander in the *Journal of Legal Education*, the scheme looked at three family factors (an applicant's family income, mother's education, and father's education) and three neighborhood factors (proportion of single-parent households, proportion of families receiving welfare, and proportion of adults who had not graduated from high school). A seventh factor, family wealth, was originally included in the formula but was temporarily dropped in the final calculation for technical reasons. According to press reports, even this sophisticated system has been a failure. Jeffrey Rosen, writing in *The New Yorker*, says that UCLA's use of "seven rather Dickensian indicators of social deprivation ... failed to produce more African-American admissions."

But according to Sander's study, the press reports are simply wrong. Looking at last year's admissions, Sander told me, "Our research clearly shows that class-based affirmative action produced more than twice as many black admissions as we would have had under a system entirely driven by LSATs and grades." The effect on black enrollment was even greater. Because those African Americans who were admitted to UCLA on test scores and grades were almost certain to have been admitted to more prestigious law schools, and were likely to have turned UCLA down, Sander found that class-based affirmative action boosted black enrollment at UCLA to 13 times what it would have been under a system of test scores and grades.

Latinos fared extremely well under the class-based affirmative action regime. Almost the entire decline in Latino admissions at UCLA last year is attributable to the decline in applications — a quirk due to the fact that racial preferences were barred in California and Texas, but nowhere else in the country. Had applications not declined, Sander found, Latino admissions would have been "virtually unchanged" under the class- rather than race-based affirmative action system.

If students had been admitted purely by test scores and grades, Sander found, UCLA's enrollment would have been 2.3 percent Latino, black, and Native-American. Under UCLA's moderately aggressive use of SES, the Latino, black, and Native-American representation was 13.1 percent.

Using racial preferences, these three groups had constituted 25.1 percent of the class. Among students who scored high enough to be considered, the class-based system disproportionately benefited people of color: 14.5 percent of whites, 25.9 percent of blacks, and 30.1 percent of Latinos in the targeted test range were admitted with an SES boost.

Meanwhile, Asian-American enrollment increased by 29 percent under the new class-based system, (from 16.7 percent of the student body to 21.5 percent) and white enrollment increased by 12 percent (from 58 percent to 65 percent of the student body). The switch from race to class preferences saw an overall decline

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in minority enrollment, then, but it seems odd to use the term "whiteout" to refer to a class that is — after the end of racial preference — 35 percent people of color.

Sander notes that UCLA was more successful than Berkeley's Boalt Hall Law School or the University of Texas Law School in maintaining some racial diversity; and he attributes the relative success to UCLA's socioeconomic program. The other law schools, he said, informally incorporated SES considerations on an individualized basis, but "they haven't articulated any sort of set of criteria that they use" or implemented preferences in a systemic way, though he notes that Boalt Hall is "actively looking at what we're doing."

Which is not to say that UCLA's own program cannot be improved in order to make it more fair, and to increase the racial dividend in the future. Last year's program did not incorporate net worth; this year's program will. Likewise, family structure has not been part of the individual family measure, though Sander says, "We're talking about including it in the future."

Finally, UCLA chose to pursue only a moderately sized SES preference, smaller than the one provided for blacks under race-based affirmative action. With an academic index of 0-1,000 points, individuals scoring 818 were automatically admitted; the most economically disadvantaged were admitted with a 625; while under the old system blacks with scores of 550 were admitted. But arguably the economic preference should be at least as large as the preference had been for blacks, since all those benefiting from an SES boost have demonstrated an ability to overcome tangible obstacles and are likely to go much farther in life than their test scores predict. As Lani Guinier notes, Harvard found in a study of three classes that its most successful graduates 30 years later were those with low SATs and blue collar backgrounds, a group which administrators characterize as "hungry." UCLA's experience last year was that the larger the SES preference, the greater the racial yield. In the 760-814 range, blacks and Latinos were admitted at twice the rate of whites; but in the 625-699 range, the multiple was eight times. According to a simulation, Sander found that using a larger socioeconomic preference — reaching down to 575 — would increase black, Hispanic, and Native-American enrollment by another 46 percent above and beyond the increased representation achieved using a moderate preference. In all, the large SES boost would produce a class with seven times as many blacks, Hispanics, and Native Americans matriculating as a system using test scores and grades alone.

If UCLA's program was somewhat successful in helping to stem the decline in racial admissions, it was fabulously successful in creating greater socioeconomic diversity. In 1991, during the heyday of racial preferences at UCLA Law, Sander did a survey which found that in the national population of individuals in their twenties, those with families whose income was in excess of $200,000 were 50 times as likely to be UCLA students as individuals whose families were in poverty. These numbers track with law schools nationally, where a 1995 survey found that 41 percent of students had fathers with graduate degrees compared with 8 percent of men aged 45-64 in the general population. While law schools almost universally claim to seek socioeconomic along with racial diversity, Linda Wightman's study found that "schools are not currently placing special consideration or weight on SES factors in the admission process." After instituting the socioeconomic preference at UCLA, Sander says, "the resulting student body, as a whole, matched the American citizenry remarkably closely."

Socioeconomic diversity should, at least as much as racial diversity, enrich the academic discourse by bringing diverse experiences into the classroom. Arguably, a poor white student from a Tennessee farm might add more to the discussion in a law school class made up largely of upper-middle-class whites than a black corporate lawyer's son from Connecticut. Yet the emphasis on socioeconomic diversity is surprisingly out of fashion, Sander finds. Outside of his colleagues at UCLA, he says, "only one out of every 20 people I've talked to in the legal academy seem to attach value to the idea of economic diversity." Says Sander: "Schools that are willing to throw themselves into the fire to preserve racial effects act like class-based affirmative action is if anything a bad thing. 'Why would we want all those low-class people here?' It's very odd."

The fact that UCLA's experiment with class-based affirmative action provided substantial SES diversity and some racial diversity is a very hopeful harbinger for its use in other academic settings. For one thing, as a top 20 law school, UCLA's racial preferences had been more substantial than those employed at less selective law schools — or at most undergraduate colleges — so the racial dividend of SES preferences was harder to sustain than it will be elsewhere. Moreover, Sander says, racial declines in California and Texas public universities were "much worse" than they might otherwise have been because UCLA and others were competing for minority students against universities in 48 states (as well as against

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private universities in California and Texas) not subject to racial bans. Predictably, academically talented people of color shied away from California and Texas public law schools — knowing that fewer people of color were going to be admitted and not wanting to find themselves racially isolated. The number of black applications at UCLA dropped by one-third, and this drop accounts for one-third of the decline in blacks admitted, Sander says.

If the U.S. Supreme Court overturns its 1978 decision in University of California Board of *Regents v. Bakke* — so that all public and private universities are barred from using race in admissions — class-based preferences would have a dramatic effect, Sander says. "If you look at the big picture of what would happen to American legal education if you did this systemically, the racial effects would be incredible." With a racial ban, studies find that blacks are likely to shuffle down two tiers in law schools, and large numbers won't attend at all, since unlike colleges there are no non-selective law schools. Using class-based affirmative action would stem that tide, Sander says, reducing the number of blacks no longer attending law school to those who might well have failed law school or the bar anyway. "Globally, the impacts are much greater than we're talking about here [at UCLA]."

Sander's numbers suggest that even with an improved class-based affirmative action system accounting for aggregate differences between black and white poverty and giving a generous SES boost, economic status does not entirely explain the black-white test score gap and so will not result in the same level of racial diversity as the old system of racial preferences. There is no better way to ensure an entering class that is, say, 8.2 percent African American than to count race per se. If the question is framed in terms of what provides the most efficient and ironclad way of guaranteeing a given racial representation, class is an imprecise proxy for race. But the whole point of recent court decisions and the vote in California on Proposition 209 is that people no longer accept the idea that we should mandate a given racial outcome, and fairness be damned. The fairness of racial preferences turns on whether the continuing racial gap, after factoring in economic obstacles, is due to discrimination, genetics, or culture.

As a matter of justice, one could argue, blacks should receive bonus points above and beyond any socioeconomic preference because they face discrimination not faced by whites. Granted, discrimination against an applicant's parents or grandparents in employment or housing is already captured by the economic preference for low family income and living in bad neighborhoods and attending bad schools. But what about the fact that black students themselves are more likely to be harassed by the police or by security guards in the mall or that they have difficulty getting a taxi — all because they are black? These are highly troubling forms of discrimination, and our legal system must hold discriminators accountable by, for example, punishing offending cab drivers. But it is hard to see how this form of discrimination justifies a blanket preference for all African Americans and Latinos to Berkeley.

A more direct link might be shown if it were demonstrated that racist elementary and secondary teachers have unjustified lower expectations for black kids, which unfairly reduces their academic performance. This is a serious argument, if proven, but the proper remedy is better training of teachers. The problem with providing explicit racial preferences in university admissions to offset low expectations of K-12 teachers is that the very existence of such preferences may feed low expectations in the future. There is some evidence that the cure can promote the disease: Researchers find, for example, that the "mere mention" of affirmative action during polling can increase negative white resposes about blacks generally. A final explanation might be test bias: that the SAT and LSAT are culturally biased and do not demonstrate the innate ability of students. The claim is certainly true — the tests are culture-bound — but it is highly important that all students be able to master mainstream American culture. As Alexander Bickel wrote: "Culture in the larger sense is what universities aim to transmit and what students must work and achieve in."

In any event, the Supreme Court does not allow universities to give preferences to African Americans on the presumption of societal discrimination. In practice, remedial preferences are normally available only if an individual applicant documents specific ways in which discrimination has made her academic record unpredictive of her long-term potential. Where such showings can be made, these individualized preferences based on racial discrimination (as opposed to race) are in my view fully justified; but that is quite different from adding large bonus points based on skin color across the board.

On the other extreme, there is the genetic explanation, an ugly theory that rears its head periodically, but has been thorough discredited on each occasion. It may be that some conservatives embrace racial preference precisely because they suspect that there

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are deep intractable genetic differences between racial groups, and preferences are the only way to keep the peace. Nathan Glazer, for example, responded to the argument made in *The Bell Curve* not by disputing its accuracy but by asking, "whether the untruth is not better for American society than the truth." At bottom, those who say class-based affirmative action won't produce additional racial diversity — no matter how fair — are too pessimistic about the abilities of black people.

A third possibility for the continuing test gap is cultural. As proponents of diversity themselves point out, race and ethnicity are rough proxies for culture, and cultural differences can be meaningful and significant. As a group, Asian-Americans are outperforming whites academically and constitute 38.3 percent of those admitted to Berkeley under the new race-blind admissions process, even though they make up only one ninth of the California population. Obviously, the fact that whites perform more poorly than Asian-Americans cannot be pinned on discrimination, and culture plays a significant role. This cultural factor is more mutable than genetics, but less responsive to public policy than discrimination.

In the end, then, a system of admissions that looks at talent plus obstacles seems to provide the best approximation of equal opportunity. On the means side, it is likely to comport with political, legal, and moral views of fairness. People accept the notion that the poor face obstacles, and are supportive of the progressive income tax but would likely balk at a higher marginal tax rate for whites than blacks. According to a December 1997 *New York Times* poll, Americans reject racial preferences 52-35 percent but in the event of their demise, support preferences for the poor by 53-37 percent. On the result side, class-based affirmative action will produce more racial diversity than straight reliance on tests and grades; less racial diversity than a reliance on racial preference; and more socioeconomic diversity than either approach. Rather than covering up an unjustified reliance on test scores (that ignores background unfairness) with cosmetic racial preferences, we should harness the desire for inclusion to ensure that the entire system is more just.

The experience at UCLA shows that while there is some tension between justice and ethnic proportionality, between genuine equal opportunity and equal group results, there is not an iron-clad contradiction, as the racial pessimists have been insisting. Fairness — genuinely and aggressively sought after — is compatible with, indeed helps secure, important measures of racial and economic diversity. ◎

The Washington Monthly *Journalism Award*

APRIL 1998

JOE STEPHENS
"On Their Honor: Judges and Their Assets" A two-part series
The Kansas City Star

It is against the law for a judge to preside over a case in which he or she has even the smallest financial interest. Yet Stephens found that federal judges in and around Kansas City "issued more than 200 court orders while holding interest in a litigant."

MICHAEL MOSS AND CHRIS ADAMS
"For Medicaid Patients, Doors Slam Closed"
The Wall Street Journal

Medicaid recipients are being forced out of nursing homes because they do not bring in as much money as those who pay the cost out of their own pocket.

ELENA MANNES
"Busted: America's War on Marijuana"
Frontline

One-fourth of the money spent in the War on Drugs — $10 billion a year — goes toward fighting marijuana. Yet, as this program demonstrates, many of the federal, state, and local agents involved have doubts about whether we should be sending so many non-violent pot offenders to jail.

THE MONTHLY JOURNALISM AWARD is presented each month to one or more newspaper, magazine, radio, or television stories (or series of stories) that demonstrate a commitment to the public interest. We are particularly interested in reporting that explains the successes and failures of government agencies at all levels and of other institutions such as the media, corporations, unions, and foundations that contribute to the existence or solution of public problems. Please send nominations (including two copies of the article or broadcast text) to Monthly Journalism Award, 1611 Connecticut Ave. NW, Washington, DC 20009. Nominations for stories run in May are due June 2.

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Tidbits & Outrages

He didn't want them to know he was driving without a license

Stopped by state troopers for driving at night without his headlights, a Florida driver fled his vehicle, leaving the corpse of his estranged wife in the back seat.

Maximum security, minimum confinement

Prison officials in Linn County, Ore., recently banned underwear for male inmates.

It's for the science fair ... honest

A California eighth-grader was recently suspended for taking a bag of homemade napalm to school.

Give us your tired, your poor, your horny

A recent parade in Cologne, Germany featured a float depicting a giant Bill Clinton groping an angry-looking Statue of Liberty.

ART: RENEE WINFIELD

Then the minister opened fire with an assault rifle

When his wife tried to walk out of a marriage counseling session at their church, a Texas man pulled out a gun and shot her. The woman, in turn, pulled a gun out of her purse and fired back.

Clean up needed on Aisle 5!

A Milwaukee woman was charged with cutting off the nose of another customer who was trying to go through the express checkout lane with too many items.

Today inhalers — Tomorrow it could be aspirin

A Maryland girl was reprimanded by school officials for allowing a fellow student suffering from an asthma attack to use her inhaler.

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Mortal Combat

How the death penalty polarized the Supreme Court

BY EDWARD LAZARUS

In September 1985 the conflict within the Supreme Court over the death penalty came to a head with the case of Willie Jasper Darden. Darden was a black man who had been convicted in a Florida court 12 years earlier of killing a white man during a furniture store robbery, then making sexual advances on the victim's wife and wounding a neighbor who stumbled on the crime. After a Florida state court affirmed Darden's conviction and sentence, his case was appealed on consitutional grounds, and it was again affirmed. Florida set Darden's execution for Sept. 4, 1985 — well before his deadline for filing the certiorari *(cert.) petition that was necessary to grant a full Supreme Court review of the case. Naturally, he applied for a stay of execution to allow him to present his claims, and that application reached the Supreme Court on Sept. 3.*

Justices William Brennan and Thurgood Marshall, of course, immediately voted to grant Darden a stay. And Harry Blackmun and John Paul Stevens joined them. Both Blackmun and Stevens believed that every capital defendant deserved one complete round of federal habeas review (an appeal on constitutional grounds). Brennan and Marshall did not pretend that their abolitionist position on the death penalty could be squared with the court's precedents. Instead, they declared themselves excused from following *stare decisis* — the principle of acceding to past decisions, especially ones that the court repeatedly reaffirmed. According to Brennan and Marshall, the court was so fundamentally wrong in its interpretation of the Eighth Amendment [which prohibits cruel and unusual punishment] that they were bound "by a larger constitutional duty ... to expose the departure and point towards a different path."

From the book CLOSED CHAMBERS *by* EDWARD LAZARUS
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Whatever the duo's justification, the acid stream of abolitionist dissents ensured that the issue of capital punishment continually ate away at the connective tissue of the court community. After *Gregg* [the 1975 case in which the court reauthorized capital punishment] the court handed down a number of decisions further restricting the death penalty. But every success for Brennan's and Marshall's short-term goal of stalling executions only made an eventual backlash more certain.

By a few minutes after 6:00 p.m., all the votes were in, and Darden's stay application had failed by a now familiar 5-4. On hearing this news, with less than 12 hours before the execution, Darden's lawyers scrambled to think of some strategy to save their client. They knew that they had garnered four votes for a stay. They also knew that two years before, in another capital case where the court had denied a stay 5-4, the conservative majority had promised that if only the applicant had "convinced four Members of the court that *certiorari* would be granted ... a stay would be issued."

The crux of the problem was that while Justices Warren Burger, Byron White, Lewis Powell, William Rehnquist, and Sandra Day O'Connor could prevent the court from issuing stays of execution, they could not prevent the remaining minority from making two other kinds of decisions central to the consideration of capital cases.

First, under the court's rules, a minority of four justices was sufficient to grant *certiorari* and force the court to conduct a full review of a case. Second, a mere three Justices could place a "hold" on any cert. petition that they considered related to a case already pending. The hold rule was meant to ensure that the parties to every case still in the judicial pipeline would receive the benefit of whatever changes in the law the court might make in its upcoming decision.

The court's minority-based rules were predicat-

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ed on a level of trust and consideration among the justices — the idea that, in certain matters, simply out of respect for one another's judgments, the entire court would allow itself to be bound by a minority of its members.

Given the Burger court's close division between liberals and conservatives in the capital cases and the growing rancor on both sides, it was only a matter of time before the minority-based cert. and hold rules came into direct conflict with the majority rule governing stays. In capital cases, uniquely, a vote to grant cert. or to hold a case was not necessarily self-sufficient. When a capital defendant came to the court with an execution date already set, a cert. grant or a hold vote wouldn't be effective unless the court also issued the defendant a stay of execution. In the absence of a stay (requiring five votes), the defendant would be dead before the court took final action on his case.

The asymmetry in procedures meant that in death cases in which an execution was set, the conservatives held an effective veto whenever the liberals voted to grant cert. or hold: They could simply refuse consent for a stay. It was thus only a matter of time before the question arose whether, in the recrimination-filled context of capital stays, the conservatives would continue to honor the court's nonmajoritarian traditions.

Conservatives were fed up with Brennan and Marshall behaving like abolitionist agents in judicial garb. Their two automatic votes to grant or to stay or to vacate in every capital case mocked the court's precedents and skewed the balance between its majority and nonmajority rules. From the conservative perspective, the liberals, including Blackmun and Stevens, were manipulating the cert. rule and the hold rule to delay legal executions. First, the liberals would grant cert. in what the conservatives saw as cases clearly unworthy of the court's attention. These internal maneuvers worked hand in glove with the abolitionists on the outside. Trying to take advantage of the three-vote hold rule was a favorite tactic of the death penalty defense bar. As soon as the court granted cert. in a capital case, the NAACP's Legal Defense Fund or some other group would be arguing in every cert. petition that their clients' cases were related and should be held until the court issued its ruling — and, of course, that stays of execution should be meted out accordingly. In light of these tactics, the conservatives felt perfectly justified in exercising whatever power they could to keep executions on track.

From the liberals' perspective, the conservatives were now willing to subvert even the court's own processes to keep the "Old Sparkys" of the South in business. For justices uneasy about, if not unalterably opposed to state-sponsored killing, that was an insult touched with evil. The whole point of making the cert. and hold rules nonmajoritarian was to give a minority of justices the power to prevent a majority from denying a cert. petition. Surely the majority should not be allowed to defeat those rules by withholding a stay and waiting for the petitioner's execution to moot his appeal.

What was really going on here, the more liberal justices believed, was sheer hostility to capital defendants whatever their claims. Certainly Stevens and Blackmun considered themselves absolutely scrupulous in what cases they voted to stay and hold — conscientious in their effort to make the death penalty as fair and rational as possible. By contrast, no one could even remember the last time Burger or Rehnquist voted to stay or hold a death case, no matter how appropriate. (Indeed, in his 14 years on the court, Rehnquist had pursued a kind of reverse absolutism, not once voting to overturn a death sentence even on those rare occasions when his colleagues unanimously found that result to be compelled.) And the record of the other conservatives wasn't much better. The conservatives' new attitude was simply, "Let's get it over with." That wasn't judicial; that wasn't even toughness; that just seemed mean and wrong.

In May 1986, while Darden was still pending, Brennan, Marshall, Blackmun, and Stevens voted to hold for Darden the cert. petition of Ronald Straight, who was also in need of an emergency stay. Again the liberals and conservatives stared each other down, but this time Powell — who had emerged as the swing vote in capital cases — refused to blink. He didn't think Straight's position was sufficiently related to Darden to warrant a hold. Moreover, Straight was on second federal habeas, and Powell thought his new claims presented a clear case of abolitionist "sandbagging." He felt the liberals were invoking the hold rule in bad faith, and he preferred to see the sanctity of the rule broken rather than postpone another execution on mere pretense.

After another night of hair-tearing fury, Brennan fired off a pointed dissent, which Marshall and Blackmun joined. Straining to find language sufficient to his outrage, Brennan wrote that by rejecting the hold rule the majority had rejected "those first principles of justice that ultimately define a system of law: the principles of uniform application of rules of consistency, of evenhandedness, of fairness." He was certainly right that if Straight had been anyone other

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than a capital defendant facing immediate execution, his case would have been held. But in the last few years, the conservatives had succeeded in turning the trope "death is different" — once the justification for especially exacting procedures — on its head.

In the Darden case, as the requisite four votes to grant cert. rolled in, a game of judicial chicken began. Despite their assurance two years previous about issuance of a stay to preserve a granted case for argument and decision, the conservatives were balking. Burger was adamantly opposed to a stay. From out of town, Rehnquist phoned in his vote to deny, as did White, even though he had authored the Autry promise. O'Connor followed suit.

As clerks scurried from one heated argument to another, Darden's fate came to hinge on Justice Powell. Despite his hostility to federal habeas, and his abhorrence of abolitionist tactics, Powell was not, as were Burger or Rehnquist (and increasingly White), totally immune to allegations of constitutional error. As circuit justice for Georgia and Florida, Powell served as the court's point man on a disproportionate number of capital cases, a chore that nourished his personal discomfort with administering the death penalty. On many late death-watch nights, clerks remember seeing Powell's frail, almost ghostlike figure hovering around Chris Vasil's desk, supervising the final hushed communications between the court and a prison. Some clerks worried that the pressure of so often casting the crucial life-determining vote might ruin Powell's own fragile health. The pressure was never greater than in Darden's case, but Powell, unlike Blackmun and Stevens, saw nothing in Darden's papers that called his guilt into question or in any other way merited a cert. grant.

The next day, Powell circulated a rare angry memo. To him, Darden's 12 years of appeals, now extended by the court's own acceptance of the case, symbolized everything that was wrong with the system. "I have no doubt as to the constitutionality of capital punishment," he wrote, but because of the delays caused by federal habeas, "I have grand doubts as to whether it now serves the purposes of deterrence and retribution, the principal purposes we identified in Gregg." Indeed, Powell was so upset he raised the possibility of dramatic reform: increase the number of justices required for a cert. grant to five.

By 1985, the bruising arguments over the death penalty, beyond straining relations among the justices, had begun to break down the internal rules that for decades had governed the court and its docket. Of the 1985 term, Blackmun had suggested that perhaps the Supreme Court's center had held, but "it had bled a lot." That loss of blood was not merely a matter of politics, liberal or conservative. The wound to the center was a wound to the most vital organ of the court — to its ability to reach collective judgment, to deliberate on the nation's fundamental values and beliefs, and to translate those values and beliefs into a coherent rule of law. There are some disagreements so deep that the disputants share no moral ground and have no mutually recognized obligations to meet. Neither side can shake the other's convictions, and both are reduced to exchanging accusations of hypocrisy and bad faith. The capital cases were driving the court toward this polarized nightmare.

A Hard Case

If the court's liberals often ignored precedent in their furious opposition to the death penalty, the conservatives overreacted by turning a blind eye to the details of many capital cases. Nothing illustrated the dangerous potential of this conservative backlash better than the case of the "cop killer" Warren McCleskey.

At approximately 2:15 p.m. on Saturday, May 13, 1978, four armed men, all black, robbed the Dixie Furniture Company, at 993 Marietta Street, N.W., in the midst of on unremarkable business district of Atlanta, Georgia. Having cased the store earlier in the day, three of the men — David Burney, Bernard Dupree, and Ben Wright Jr. — lowered stocking masks over their faces, rounded up several store employees, and moved into Dixie's back offices in search of money.

The fourth man, Warren McCleskey, ran into the front of the store and disarmed Dixie's private security guard. McCleskey ordered the guard, his brother, and the two other Dixie employees who were present to lie on the floor, but not before one of them managed to hit the store's silent alarm. Oblivious to the alarm, McCleskey continued to watch over the front while, in the rear, his cohorts forced the store manager to hand over an undetermined amount of cash (somewhere between $500 and $1,500).

At 2:20, police officer Frank R. Schlatt responded to the Dixie alarm. Officer Schlatt parked his squad car in front of the store and walked through the glass-paneled front door. Inside, a voice called out a warning — "The cops." The next few moments passed in silence as Schlatt, gun drawn, walked roughly 40 feet up the store's center aisle. Then, two shots. The first bullet entered Schlatt's right eye and lodged in his brain. The second hit his chest, deflecting off his cigarette lighter. Thirty years old, white, married with a

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child, Schlatt died almost instantly.

On being questioned about the Dixie case, McCleskey denied having anything to do with the robbery and shooting. He said he just knew what he'd read in the papers. The next day McCleskey decided to give the police a new statement. This time, he admitted being part of the Dixie Furniture robbery but denied shooting Schlatt.

McCleskey's preliminary hearing (at which a judge evaluates whether the state has probable cause to indict a defendant) was set for a week later, June 7. McCleskey was leery of the public defender's office, and his sister, Betty Myers, managed to retain a lawyer. For the price of $2,500, Myers hired John Turner, a solo practitioner concentrating mainly on criminal matters who had several years' experience as a federal prosecutor in Atlanta. The fee was paltry for virtually any case, much less one involving a highly publicized cop killing and the possibility of a death sentence, but it was all Myers could afford.

At the preliminary hearing, it became apparent what a godsend Burney's and McCleskey's confessions were for the prosecutor. None of the Dixie store employees could positively identify McCleskey; indeed, some of their descriptions from the day of the robbery did not resemble him. Moreover, none of the employees had seen who shot Schlatt, or even knew with any degree of certainty where in the store each of the robbers was at the time of the shooting. All the potential eyewitnesses had been facedown on the floor, with the ones at the back bound and blindfolded as well. The prosecution had not recovered a murder weapon.

At McCleskey's arraignment on July 20, the judge set trial for Sept. 25. At this point, McCleskey's lawyer had yet to interview any potential witnesses. In Turner's view, the D.A. had "almost an air tight case." Although he informed McCleskey that no eyewitnesses had yet identified him as one of the robbers, Turner consistently advised his client to plead guilty rather than risk the death penalty, which the D.A. intended to seek assuming the case went to trial.

Despite his confession, McCleskey wanted to risk a trial. He intended to put forward an alibi defense — that he had spent the afternoon of May 13 at his sister's house playing cards. McCleskey hoped to suppress or at least discredit his confession by claiming that the police had coerced him into making up lies. And, thus, while Turner and Parker discussed the possibility of Parker accepting a guilty plea in exchange for a sentence of life imprisonment, no deal was ever offered and McCleskey refused even to consider the idea.

Turner's defense consisted almost entirely of putting McCleskey on the stand to disavow his confession and put forward his alibi. Thirty years old, divorced, the father of a 12-year-old daughter, McCleskey admitted to spending more than seven years in prison for a series of armed robberies committed in 1970.

The jury took only two hours to return a guilty verdict.

The same jury then convened again to consider whether to sentence McCleskey to death. Under Georgia law (similar to that of a number of states), during this penalty phase the prosecutor must prove that the murder in question involved at least one of the statutorily enumerated aggravating circumstances distinguishing capital murder from ordinary murder. These circumstances included whether the murder involved torture, whether it was a murder for hire, or, as in McCleskey's case, whether the murder occurred during the course of another serious felony or the victim was a police officer.

If the court's liberals often ignored precedent in their furious opposition to the death penalty, the conservatives overreacted by turning a blind eye to the details of many capital cases.

At the same time, the law provided the defendant with the opportunity to present any mitigating evidence to suggest that the jury should not impose the death penalty. Such testimony often took the form of a personal statement by the defendant; favorable testimony about his character from family members, friends, or ministers; evidence that the defendant had been abused as a child, or was mentally or emotionally impaired. Assuming that the jury did find the presence of an aggravating circumstance qualifying the defendant for death, it still had absolute discretion to forgo that sentence if it so chose.

Parker argued passionately for the jurors to return

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a sentence of death. "Have you observed any repentance by Mr. McCleskey?" he asked them. "Has he exhibited to you any sorrow? ... Have you seen any tears in his eyes for this act that he has done?"

Turner presented not an iota of the mitigating evidence that frequently proved decisive in averting a death sentence — nothing about McCleskey's illegitimate birth to skid row parents, his childhood spent selling bootleg liquor to patrons of neighborhood gambling houses to supplement the family income, or the many times he called the police to stop his stepfather from battering his mother. Turner later claimed he had asked McCleskey's sister about potential character witnesses; she denied he had done so. In any event, the jury went back to the jury room never having heard a word of testimony that McCleskey did not deserve death or for simple mercy, even from McCleskey himself.

Two hours later the jury sentenced Warren McCleskey to death, and Judge Mackenzie set an execution date a month hence, Nov. 27, 1978. John Turner looked at his client and asked whether he didn't wish now that he'd copped a plea.

Color Scheme

McCleskey's case soon became an important test for the NAACP's Legal Defense Fund (LDF). Starting in 1978, the LDF had commisioned a series of state-of-the-art analyses to assess the role race played in several of the new capital sentencing schemes. The lead study — known and the Baldus study after its principal architect, David Baldus of the University of Iowa — examined more than 2,400 post-Furman [the court's 1972 abolition of the death penalty] homicides in Georgia and became the basis of a new claim that Georgia's post-Gregg system for imposing the death penalty was unconstitutionally biased against blacks.

From the moment his became the test case for the LDF's discrimination claims, McCleskey's lawyers faced a crucial choice. They could focus on his case: a midrange case in which the evidence of discrimination was strongest, a cop killing in a county where not one of 16 other cop killers had received a death sentence. Such a strategy would have highlighted the sentencing disparities at his level of aggravation, the unbridled prosecutorial discretion in his case, and possible remedies short of shutting down Georgia's capital system.

But agenda-driven litigation inevitably brings competing obligation. A tension develops between achieving victory for the individual client and advancing the broader goals of the interest group molding a test case. Some of the most powerful arguments to get Warren McCleskey off death row would at best secure only a modest gain for the larger cause of abolition.

As argument day for McCleskey approached, Eben Moglen, a new clerk for Justice Marshall, started work on his bench memo. The level of apprehension about the case was already extremely high. It was the biggest case of the October sitting, perhaps of the whole term, a case that had been simmering at the court for a year, now moving toward boil. Although absolutely convinced of the merits of the LDF's arguments, Moglen wasn't optimistic. "A loss is very likely indeed," he wrote Marshall, "but I think if we choose our ground right, we have some running room, and we should be able to make a real fight of it."

For Moglen, the right ground was undoubtedly that of race discrimination. Under the court's precedents, to prove a case of race discrimination, a plaintiff had to show: 1) disparate impact on a group entitled to special judicial protection (such as blacks or women); 2) the existence of sufficient discretion in the system to make discrimination against this class possible; and 3) a history of past discrimination.

The Baldus study fulfilled the first requirement. As for the second, the Georgia death penalty system was among the most discretionary. And no one could deny Georgia's history of maintaining a dual system of justice for blacks and whites. At a minimum, then, Moglen considered it irrefutable that the justices should send McCleskey's case back to the lower courts to see if Georgia could come up with a plausible and legitimate explanation for Baldus' results. Fantasizing, Moglen couldn't resist predicting: "I think the state will necessarily fail and the party will start."

Separate from the technical merits of McCleskey's equal protection claim, Moglen advised Marshall to make a stand on the race issue rather than some Eighth Amendment argument because it was the alternative "which frees us most to talk about what's really going on here." In Moglen's view, McCleskey at its core was about the ancient southern rule governing what happened to any black so-and-so who dared kill a white. In the last 30 years, the justices had fought racism in schools, at lunch counters, in the workplace, and at the local pool. Would they now turn their backs on that quest for racial justice because the stakes were not swimming pools but a man's life?

What Moglen called "the immense rhetorical and substantive advantage" of focusing on race, however, was not so keenly felt in the chambers of those justices who might conceivably join Brennan, Marshall, Blackmun, and Stevens as a fifth vote to annul Geor-

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gia's death statute. In the center of the court, the once powerful consensus to sweep away the vestiges of slavery and Jim Crow had shattered on the diamond-hard issues of remedy, specifically busing and affirmative action. In the face of public resistance and personal uncertainty, the justices had come to disagree sharply over what role the judiciary could and should play in seeking to right historic wrongs and in pursuing the goal of equality under law. In seeking to build on achievements of the past, the civil rights community still won occasional victories at the court (especially in gender discrimination cases), but they were hard fought and close, and each one seemed to dissipate what had been a shared vision for reshaping the racial balance of society.

Leslie Gielow, the clerk handling McCleskey for Justice Powell, was convinced that McCleskey and the LDF should prevail. She even approached the clerks in more liberal chambers hoping to find arguments that might persuade her boss. It was true that the previous year Powell had written a strong equal protection opinion in *Batson v. Kentucky*, which lessened the evidentiary burden on a defendant trying to prove that a prosecutor had used peremptory challenges to exclude blacks from the jury. Powell in that case had adopted exactly the method of proof the LDF was suggesting in McCleskey: Once the defendant demonstrated a racial pattern in a prosecutor's peremptory challenges, the burden shifted to the prosecutor to rebut this inference of discrimination. Powell's Batson ruling seemed perfectly suited for a case involving (in large part) a prosecutor's discretionary decisions leading up to a death sentence. And it was certainly a favorite clerk tactic to try to influence a justice by hoisting him on the petard of his previous writings.

Gielow, though, despite considerable agonizing, never really pressed the case with Powell. She was new at her job and had the strong sense that her boss's mind was made up. It seemed to her that Powell had crossed the point of no return in Gregg, when he not only approved Georgia's capital punishment system but applauded it as among the nation's best. More liberal than the Justice she worked for, Gielow know she'd have to pick her fights, and there was little point in wasting precious capital on a lost cause.

Clerks in other conservative chambers shared her sense of helplessness. A number of them were impressed with the Baldus study and tried to get their bosses to give it careful attention. Several clerks, even one of Rehnquist's, suggested that the court appoint a special master — an independent expert — to give the mathematically challenged justices a neutral assessment of Baldus' methods and findings. The conservative justices would have none of it, though.

The idea of appointing a special master presupposed that the conservative justices were still open to convincing. But the evidence was increasingly to the contrary. Even before hearing oral argument, Justice White took the extremely unusual (and perhaps unprecedented) step of sending Justices Rehnquist, Powell, O'Connor, and Scalia a detailed memo — behind the liberals' backs — urging a unified vote to reject McCleskey's claims and laying out his analysis for dispensing with the Baldus study. In White's view, to accept the LDF's arguments in McCleskey would be to return the court to the position it had taken in Furman, and he wanted to preempt any possibility of heading back down that road.

In this he succeeded. By the time Jack Boger (the LDF lawyer representing McCleskey) stood before the bench at oral argument on Oct. 15, for all practical purposes, the fix was already in, preset in White's memo and subsequent conservatives-only tête-à-têtes.

The conservatives made no secret of their hostility. Five minutes into Boger's presentation, Justice White hit him with a series of curt questions insinuating that the data collectors for Baldus' study had been insufficiently trained or incompetent. White always seemed to take great pleasure in intimidating lawyers appearing before the court, badgering them, often about small points, demanding a yes or no answer whenever his targets tried to offer a nuanced or qualified response. And he turned on Boger with enthusiasm.

The Justices took up McCleskey at their conference on Friday, Oct. 17, but White did not wait even that long to resume his crusade. In a rare preconference memo (this one to all the Justices), he not only tried to undermine one of McCleskey's key claims but also called into question Boger's truthfulness. At oral argument, White had suggested that McCleskey was hard-pressed to argue that he was a victim of prosecutorial discrimination because, according to Judge Forrester, he "was offered a plea bargain and turned it down." Boger had responded that Forrester had gotten the facts wrong, that John Turner, McCleskey's original lawyer, had urged his client to plead guilty in exchange for a life sentence, but that the prosecutor had never offered a plea bargain, and McCleskey had decided against asking for one. Parker had confirmed this himself in a deposition before the state habeas court.

White, though, was not a justice to take contradiction lightly. Immediately after argument. he ordered

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the entire habeas record sent overnight to the court so that one of his clerks could evaluate what had happened. What White found, and reported in his memo, was that in his view Boger had deliberately misled the court. White's proof was Turner's testimony at McCleskey's state habeas hearing that "the Prosecutor was indicating that we might be able to work out a life sentence if he were willing to enter a plea. But we never reached any concrete stage on that because Mr. McCleskey's attitude was that he didn't want to enter a plea."

White either didn't realize or ignored the fact that Turner gave this self-serving testimony in the context of trying to defend the competency of his representation of McCleskey, that the state had never claimed it offered McCleskey a plea bargain, that the prosecutor had specifically denied making such an offer, and that the issue of whether the prosecutor had offered a plea bargain had never been litigated. Instead, White was so suspicious of abolitionist lawyering that he was willing on flimsy evidence to implicitly accuse a leading lawyer at the nation's foremost civil rights organization of baldly lying to the court.

Whatever the effect of White's accusatory memo, his preargument campaign for a unified conservative front was fully realized. When the justices discussed McCleskey the next day, they lined up precisely as they had at the cert. stage. Briefing and argument — which the conservatives had not wanted to see in the first place — had changed nothing. Justices Rehnquist, White, Powell, and O'Connor voted to affirm the Eleventh Circuit's denial of McCleskey's appeal; the newcomer, Justice Antonin Scalia, joined them; and Justices Brennan, Marshall, Blackmun, and Stevens wanted to reverse.

Justice Brennan gave instruction to his clerk Mitt Regan about preparing a dissent in McCleskey. As January wore on with still no sign of Brennan's dissent, Chief Justice Rehnquist began to fume. Every week the court delayed in handing down McCleskey was another week the LDF could use the case as the basis for getting holds and stays of execution in other cases. In the eight months since cert. had been granted, McCleskey had created a huge backlog of capital cases, and Rehnquist suspected tht Brennan's tardiness was not the product of diligence but another of his abolitionist guerilla tactics to clog up the system. Indeed, Rehnquist became so angry that he threatened not to assign Brennan another majority opinion until he circulated a McCleskey dissent.

On Jan. 30, Brennan finally distributed his rejoinder. At the outset, it traced the court's commitment in past cases to free the death penalty from even the "risk that prejudice or other impermissible influences might have infected the sentencing decision." Then it made the case for why Baldus' statistics and the whole run of southern history compelled the "human moral judgment" that in Georgia the risk — indeed, the virtual certainty — of that infection was too great for any court to bear. Brennan dismissed Powell's fear that crediting Baldus' statistics would lead to widespread challenges to numerous other aspects of criminal sentencing. "Such a statement seems to suggest a fear of too much justice," he replied. "The prospect that there may be more widespread abuse than McCleskey documents may be dismaying, but it does not justify complete abdication of our judicial role."

In McCleskey, the conservative justices chose not to even look. Depending on the individual, that choice may have stemmed from a simple refusal to acknowledge the evidence, or a concern for the consequences of acknowledging the evidence, or an exasperation with the abolitionists who presented to evidence, or a conviction that a certain degree of racism, however regrettable, is an inevitable part of American society and law. Whatever the cause or combination of causes, this blinkering had been coming on for years as, in the face of seemingly endless litigation and abolitionist maneuvering, the conservative justices increasingly closed themselves off from the persistent proof streaming into the court that the system of death penalty adjudication seethed with error and abuse. ●

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Straight Talker

Dean Acheson was an elitist, an Anglophile, and often right

By Evan Thomas

ACHESON:
The Secretary of State Who Created the American World
By James Chace
Simon and Schuster, $30

DEAN ACHESON, SECRETARY of state in the early days of the Cold War and one of the main architects of "containing" the Soviet Union, was easy to caricature. Right-wing populists liked to make fun of his guardsman's mustache, his "fake British accent" (Joe McCarthy), his "British tweeds" (Richard Nixon), his lordly manner which translated as disdain for the less bright and lesser born. As a man he is remembered today, if he is remembered at all, as the personification of the old East Coast Establishment — the "Wasp Ascendancy," as Joe Alsop called the white-shoe bankers and lawyers and coupon clippers who ran things, more or less, for the first half of the 20th century.

Acheson was without question or apology an elitist. At the end of his life, in the early 1970s, he embarrassed the East Coast foreign-policy establishment, which was becoming increasingly liberal, by supporting continued white domination of Rhodesia and Angola. Acheson was not really a racist. Rather, as James Chace explains in his new biography of Acheson, he was a paternalist. He refused to believe that Africans, or any Third World population, could rule as well as post-colonial Europeans. Acheson was proudly Eurocentric; he would have choked on the multicultural curricula of today's universities. He enjoyed the trappings of privilege and lapped up discrete luxuries — he loved, for instance, to march in his gown at Yale commencement or to drink rum cocktails after a game of croquet at the Mill Reef Club in Antigua. And he never hid his scorn for soft or sloppy thinking. He once famously quipped that Adlai Stevenson "has a third-rate mind he can't make up."

But the image of Acheson as a striped-pants snob is stale, and misses the real point about his essential character. It is more interesting and useful to look at Acheson not as a rigid exemplar of class conformity, but rather as the opposite: as a rebel. It is his outspokenness — his brazenness — that is worth studying and remembering. Acheson consistently showed a kind of willfulness and courage in public that stands in contrast to modern policy makers, whom Acheson would have regarded as craven, or to use one of his Britishisms, "wet."

His pedigree is deceiving. He went to all the right schools (Groton, Yale, Harvard Law) and met all the right people (he roomed with Cole Porter and Archibald MacLeish). But he did not come from wealth and he was at first an outcast — too "fresh" for the stuffy sixth-formers — as well as a failure as a student, graduating last in his class from Groton. He was exiled from his home when he called his father, an Episcopal Bishop, a "fool." He seems to have grasped right away that the mavericks, not the senior-prefect types, would be the true leaders. In 1938, he was in London observing Neville Chamberlain, then the British Prime Minister, who was eagerly seeking to appease Hitler, and Winston Churchill, who was at the time just emerging from exile. "Chamberlain doesn't understand what he's up against," Acheson told a friend, "but he would be a great student at Groton. Churchill does understand it. He would be kicked out of Groton in a week."

If he had followed the usual career path of his kind, Acheson would have never left his upper-crusty law firm, Covington and Burling, to serve in government. For all the sermons about public service by the

EVAN THOMAS, *an assistant managing editor at* Newsweek, *is writing a book on Bobby Kennedy.*

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Rector, most Groton boys found government work demeaning. Acheson betrayed his class with FDR to become a New Dealer. He was a pragmatist, not an idealist or a limousine liberal. He called do-gooders "Christers" and avoided them. He was drawn to brave and plain-spoken men of any class. At international conferences after World War II he bonded with Britain's working class foreign minister, Ernie Bevin. In just the kind of stunt Acheson relished, the rough-hewn Bevin and the elegant Acheson once entered a conference hall at the Quai d'Orsay, arm-in-arm, singing songs — Bevin bellowing the Labor Party anthem, "The Red Flag," Acheson trilling "Maryland, My Maryland," which had the same tune.

Acheson's great and abiding friendship was with Harry Truman. While others at first condescended to the former failed haberdasher, Acheson was always faithful and genuinely respectful of FDR's successor. Acheson earned Truman's undying loyalty by standing on the train platform at Union Station, erect and proper in his cutaway, when President Truman returned to Washington after the Democrats had lost control of Congress in the disastrous 1946 elections. Acheson, then the number two man at State, was alone. No one else in Truman's Cabinet or sub-Cabinet had bothered to turn out. The affection between the two men deepened as Truman and Acheson, along with Gen. George C. Marshall and other early Cold War stalwarts, fashioned the Truman Doctrine, the Marshall Plan, and the Western Alliance, the lasting pillars of American foreign policy in the Cold War. These accomplishments were by no means as straightforward as they seem today. After World War II, most Americans, as Acheson's old friend Averell Harriman once said, "just wanted to go to the movies and drink Coke." It took courage and will to make the people and their congressmen, most of whom regarded foreign aid as "operation rat hole," to face American responsibilities abroad.

When anti-communism became hysterical, Acheson refused to cater to McCarthyism. He told reporters that he would not turn his back on Alger Hiss, the Harvard-trained diplomat accused of treason by Richard Nixon. As a result, Acheson was branded the "Red Dean" by the right-wingers and received so many death threats that guards had to be posted outside his house. Acheson urged Truman to fire Gen. Douglas MacArthur in 1951 when the megalomaniacal commander of U.S. forces in Korea became insubordinate, and then patiently endured nine days of testimony on Capitol Hill explaining the decision to inflamed congressmen. (When he was done, Acheson, who liked his martinis, retreated to his farm in Maryland to "test the human capacity for alcohol.")

Acheson's grandeur verged on the grandiose. He was, as he put it in his memoirs, "present at the Creation," but he could seem a little too God-like to his critics. His statements, while bold, were not always wise. His remark about standing by Alger Hiss was, in retrospect, foolish. Hiss, after all, was almost surely guilty of spying for the Soviets, and Acheson's defiance just stimulated the right-wingers to lay siege to the State Department. Acheson was known to exaggerate for effect — in his words, to make things "clearer than the truth." It can be argued that he overstated the communist threat in order to achieve the worthy goal of funding for the Marshall Plan. Acheson himself had a fairly realistic view of the threat — and was careful not to overcommit American resources to meet it. But less sophisticated minds educated by his rhetoric — like Lyndon Johnson, at the time a young congressman — tended to miss the nuances.

Acheson may have been arrogant and overbearing at times, but he had qualities that are in notably short supply today. He did not freelance with the press to undermine his political opponents, and though he was wickedly funny, he did not gossip about his work. Indeed, he generally avoided the Georgetown cocktail circuit while he was in office. He was decisive. Watching one of his less worthy successors, Dean Rusk, waffle over some tough calls in the early 1960s, Acheson wrote a friend, "The decisions are hard, but they don't, like Bourbon, improve with age."

Acheson loved power and missed it when he was out of office. After leaving government in 1953, he admitted to another friend that he found himself in a state of "bewildered emptiness at being so wholly uninformed, impotent, and on the outside." He found a niche as a Wise Man, the term used by McGeorge Bundy (a bit mockingly) to describe elder statesmen brought in to counsel the Kennedy and Johnson administrations. In his role as consigliere, he had that rare quality, the willingness to speak truth to power. In early April 1961, John F. Kennedy confided to Acheson that he was about to launch a secret invasion of Cuba by CIA-backed Cuban emigres at the Bay of Pigs. Acheson was caustic and blunt in his pessimistic assessment. It was not necessary to call in Price Waterhouse, Acheson said, to discover that 1,500 invading Cubans weren't as good as 25,000 Cuban regulars under Castro. Unwisely, Kennedy did not heed his warning. Lyndon Johnson, on the other hand, did finally listen to Acheson's assessment of the failed American war effort in Vietnam. In March of 1968, Acheson, along

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with other Wise Men, were summoned for a briefing by some military advisers at the White House. Acheson led a revolt of the elder statesman. When one general tried to explain that American forces were not trying to win a "classic military victory," Acheson cut in, "Then what in the name of God are five hundred thousand men out there doing? Chasing girls?" A few days later, LBJ announced that he was going to seek a negotiated settlement of the war.

In his book, Chace, a respected foreign-policy scholar, retails these and other Achesonian moments in a straightforward, unadorned narrative style. Still, the book will be a little disappointing to Acheson watchers and Cold War historians, who had been expecting Chace to deliver the definitive biography. Chace is a cautious, careful scholar, which is all well and good, but the fact is that most of the raw material of Acheson's life has been pretty well picked over by now. Disclosures from Soviet archives will add to our knowledge of the Cold War, but that information is really only beginning to trickle out. What Acheson demands is a biographer who is willing to explore his subject's complicated psyche — something Chace did not even attempt to do. Still, Acheson is a such an inherently interesting figure that Chace's biography is rewarding to read. Acheson's contemporaries understood his power. "Voila un homme!" exclaimed Charles de Gaulle. It's doubtful anyone will say that about his modern successors, and not just because Madeleine Albright is a woman. ●

Women in the House

Susan Molinari and Pat Schroeder on being a woman in Congress

By Clara Bingham

REPRESENTATIVE MOM:
Balancing Budgets, Bill, and Baby in the U.S. Congress
By Susan Molinari with Elinor Burkett
Doubleday, $23.95

24 YEARS OF HOUSE WORK ... AND THE PLACE IS STILL A MESS:
My Life in Politics
By Pat Schroeder
Andrews McMeel, $24.95

UNTIL RECENTLY, WHENever I tuned into CBS on Saturday to find Susan Molinari presiding over the pastel banality of the "Morning News" set, I couldn't resist thinking that her decision to quit Congress had been a cop-out. But that was before I read the memoir she has written with Elinor Burkett, *Representative Mom.* Now I know that taking the morning anchor job was her first real act of independence. Susan Molinari's grandfather, father, and husband were all politicians. Before she inherited her father's Staten Island congressional seat at the age of 32, Molinari had previously held just one job outside of politics, as a cocktail waitress one summer in college. For Molinari, entering politics was, as she puts it, the "path of least resistance." Television is her first real breakout.

As for Pat Schroeder, I still do a double take when I see her quoted as president of the Association of American Publishers. Protecting intellectual property rights and encouraging parents to read to their children hardly seems the encore I had expected from feminism's most valuable player in Congress. But Schroeder's new memoir makes it clear that she chose to bail out for just the opposite reason Molinari did. While Molinari needed to rebel against her upbringing, Schroeder needed to take a break from a long career of rebellion. At 55, she had grown tired of the fight.

The congresswomen from Staten Island and Denver left the Hill within six months of each other in 1997, and in less than a year have turned out books to tell their stories. Schroeder served in the House for 24 years; Molinari, seven. Schroeder, a liberal Democrat, is 18 years older than Molinari, a moderate Republican.

CLARA BINGHAM, *is the author of* Women on the Hill: Challenging the Culture of Congress.

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Yet the two women have striking similarities. Although they belonged to different political parties, they both worked hard for many of the same women's issues: family leave, child care, violence against women, sexual harassment, and abortion rights. They were the most colorful, high profile, quotable women on the Hill in the 1990s. Both brought a refreshing amount of energy, humor, and irreverence to their jobs. In their absence, Congress is a noticeably blander place.

As masters of the sound bite, Schroeder and Molinari are good communicators. If they are deep thinkers, they aren't sharing their thoughts, only their complaints. As Molinari writes of being a blonde female politician: "We seem to get pigeonholed as lightweights. . . . There I'd be, in a war zone in Bosnia, and some reporter — usually female — would comment on how I was dressed, then turn to my male colleague for answers to questions of substance." Yet these breezily written books are short on substance and analysis, long on self-congratulation and hubris. Schroeder, to her credit, seems to have written her book herself. Molinari enlisted Burkett, author of *The Right Women: A Journey Through the Heart of Conservative America.*

The truth is, Susan Molinari and Patricia Schroeder are both very, very goofy. Molinari makes a point of recording that at the after-party celebrating her first marriage she wore a pair of high-top sneakers decorated with white lace. The night she won her congressional seat, she danced on tabletops to "Love Shack." Then, trying to decide whether to run for governor, she found herself seconds away from a crucial meeting with a cheap plastic hairbrush tangled in her hair. "How," she wondered, "am I going to convince people that I'm qualified to be governor of New York with a brush sticking out of my hair?" Panicking, she took a pair of scissors and cut the brush — and a patch of hair — off the top of her head.

Schroeder wore an Easter bunny suit to China. She claims to have eaten 4,500 bean burritos and calls former President Bush and Vice President Quayle members of the "lucky sperm club." It just doesn't get much sillier than these two — at least in politics. But there is something to their goofiness. It's irreverent and nonconformist, and while Schroeder and Molinari aren't Thelma and Louise, both have free spirits.

Both tell tales of bucking the system. As a freshman member of the Armed Services Committee, Schroeder defied the powers that be by talking to *Redbook* magazine about the humiliations she suffered under the chairmanship of Edward Hebert, a sexist bully. Schroeder says her colleagues permanently shunned her after she became the only member of Congress to support Shirley Davis in her sexual discrimination suit against Louisiana Democrat Otto Passman.

Early in her career, Molinari broke from her party and President Bush by arguing forcefully for the Family and Medical Leave Bill. Molinari's speech followed Republican Fred Grandy's, who had reminded his colleagues that it was Small Business Week. Molinari concluded with, "Don't forget that this isn't just Small Business Week. Sunday is Mother's Day." Fred Grandy didn't speak to her for a year.

Neither woman pulls her punches when it comes to the Speaker of the House. Molinari paints Gingrich as nothing short of an incompetent, delusional megalomaniac. Her behind-the-scenes description of last summer's failed coup attempt against the speaker reveals a world of ruthless backstabbing and deft double-crossing that would make Machiavelli proud. Molinari says Gingrich compared himself to Napoleon, FDR, Churchill, and Eisenhower and was overwhelmed by his own grandiosity. When Gingrich's four top henchmen, among them Molinari's husband, Bill Paxon, Republican congressman from Buffalo, N.Y., arranged an "intervention" to tell the speaker that he had to shape up, Gingrich dissolved into a rage. "People all over the world are listening to us, watching what we are doing. I'm at the center of a worldwide revolution," he huffed, turning to Paxon, adding, "You will never understand that, Bill." After the coup, Paxon was forced to resign from the Republican leadership and would later announce his plans to retire from Congress.

Schroeder, meanwhile, relates the story of leaving for a trip to Stockholm to attend a meeting of the Organization for Security and Cooperation in Europe. The day before departure, Gingrich announced to Henry Hyde, the chairman of the trip, that he had kicked Schroeder off the delegation because she had been "nasty" to him. True to form, Schroeder threatened to hold a press conference; Newt backed down. Interestingly, it is Schroeder, not Molinari, who tells us that Gingrich secured a special room close to the House floor where Molinari could breast feed her newborn baby, Susan Ruby.

Both women are pro-choice, but that is where their sisterhood ends. For Schroeder, choice is a fundamental moral issue, defining a woman's role in society. Schroeder, who managed almost every abortion bill on the pro-choice side in the past decade, admits that she became so emotional after some of the gru-

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eling floor fights that she "would escape to the congresswomen's lounge with dry heaves."

For Molinari, abortion was just another roll call. Her loyalty came first to the Republican party. In 1994, she campaigned against incumbent pro-choice Democratic congressmen and women in favor of extremist anti-choice opponents. Her stumping helped secure the new Republican majority and her own position as number five in the Republican leadership — the highest rank a woman had ever held in Congress. "I admit that I was guilty of campaigning for anti-choice candidates. I refused to be a single-issue campaigner. Forgive me, but that's bad for America," Molinari explained unapologetically.

Pat Schroeder's conviction about abortion is both generational and personal. She was elected to Congress the year before *Roe v. Wade*, and as a young married student at Harvard Law School, she could not obtain contraceptives legally. After giving birth to her second child, Schroeder almost bled to death and was told that her life would be in danger if she ever got pregnant again.

Molinari graduated from college in 1980 and came of age in a post-feminist world. Molinari is a daddy's girl and her father happens to be pro-life. Susan may have broken personally with Dad on the abortion issue, but she didn't let her beliefs get in the way of proving to her father that she is a good Republican willing to put aside her principles for the gain of the party and her own career.

Schroeder, by contrast, is a true pioneer. In the class of 1964 at Harvard Law School, she was one of 15 women. When she first arrived in Congress in 1972, she joined 13 other female legislators. Like Molinari, Schroeder was also 32 years old as a freshman. The condescension and cruelty Schroeder suffered from senior lawmakers like Edward Hebert shaped her feminist beliefs and turned her into an outsider. In 24 years, she never grew to trust the system, and her refusal to cut deals ultimately hurt the legislative record that Schroeder leaves behind.

Schroeder's principles, however, fall short when it comes to Bill Clinton's sexual peccadilloes. By the time Schroeder finished writing her book, news of Monica Lewinsky had not surfaced, and we are given to understand that the president is "still married and working on it." Schroeder addresses Monicagate in a postscript, but admits only that she doesn't know what to think about the Lewinsky affair, and says: "I can wait until all the facts emerge so that I can digest what really happened and come to some conclusions about it." Coming from a woman as outspoken and unafraid as Pat Schroeder, that is a truly pathetic statement.

Schroeder should have more to say about Clinton's behavior because, unlike her equivocating female colleagues on the Hill, Clinton isn't signing her bills anymore. Also, Schroeder's experience with Gary Hart should have given her some wisdom. As the Hart presidential campaign co-chair, Schroeder was on the road meeting with newspaper editorial boards that day in May when the "Monkey Business" story broke. Schroeder's first reaction was, "Do you mean I've been canceling my schedule, flying to these godforsaken places, eating pressed hamster or whatever that airplane food is, while he's on a pleasure boat in Florida?" Later Schroeder concluded that Hart had used her "because having a woman at the head of his campaign might deflect these issues." She gives us no such revelations on Clinton.

In one of the opening pages of her book, Schroeder lists 16 achievements. The last on the list is: "Number of Regrets: 0." This is an early warning signal to the reader that we aren't getting the whole story. For example, Schroeder's children were ages two and six when she first came to Washington, and in a glib chapter on her family life, she glosses over the feelings of guilt and anxiety she must have felt while she juggled job and motherhood. Molinari is much more honest about the conflict she faced as a mother and a member of Congress. She talks movingly about how motherhood transformed her, and she admits the pain and guilt she suffered when her job frequently separated her from her child.

The other part of the story that Schroeder fails to give us is the nitty-gritty political maneuvering that went on behind the passage of dozens of bills she sponsored. The Family and Medical Leave Act, for example, which Schroeder introduced in 1985, took eight years to pass. Schroeder shed blood over this and others pieces of legislation, like the Violence Against Women Act. Because Schroeder isn't willing to reveal her regrets, we only get a stilted, sunny-side-up version of her long, controversial legislative career.

These books won't be the last we'll hear from Schroeder and Molinari. Someday, Schroeder will be a good subject for biography. The truth behind her quarter-century in Congress lies in piles of file boxes and 12 trunks of mementos that she donated to the University of Colorado library. Molinari makes the claim that being on national television is good political exposure. She also admits that she has flirted with running for governor, for the U.S. Senate, and even, without offering dates or naming running mates, for president of the United States. ●

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Bloody Gloves

How bad is the FBI crime lab?

By Mark C. Hansen

TAINTING EVIDENCE:
Behind the Scandals at the FBI Crime Lab
By John Kelly and Phillip Wearne
Simon and Schuster, $25

"IF SCIENTIFIC, TECHNICAL, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue," an expert qualified by "knowledge, skill, experience, training, or education" can give an opinion. So say our rules of evidence. This opens the courtroom door to opinions from experts about, say, whether a defendant left his DNA on the bloody pavement, his John Hancock on a ransom note, or his senses before he commited the crime.

But what happens when experts aren't what they claim to be? That's the question posed in this book. The subject is the "forensic science" experts of the FBI crime labs: agents who specialize in things like trace analysis, ballistics, bomb reconstruction, even psychological profiling. The FBI has long enjoyed a reputation for solving crimes too slick for the local constabulary. But what did the feds know that the locals didn't? Not much, say the authors, who, as their title suggests, posit that the FBI was solving crimes by "tainting evidence" in its fabled crime lab. The result was phony evidence cooked up by pretend experts who were really just G-men in lab coats.

According to the authors, in 1996 the FBI lab staff of 694 handled 136,629 pieces of evidence and performed nearly 700,000 examinations. While screw-ups are not unique to the FBI (one county coroner, for example, lost a head), they were apparently endemic. The problems ranged from the occasional "rogue" agent who made up credentials and tests, such as Special Agent Thomas Curran, who in 1974 lied about his degrees and the tests he had done, to more prosaic flaws in lab procedure. Without accepted standards and protocols to guide them, the bureau's men and women of science didn't document their work, didn't identify who did what, didn't do confirmatory testing, didn't sign, date, seal, and the like.

All of which was compounded by the pressure to make cases in court. Agents were not scrupulous in their science because, say the authors, they wanted to make the conclusions come out the right way and were loath to create paperwork that might undermine those conclusions. When they got to the witness stand, they often fudged the limits of their work, in effect painted over the gray with strong coats of rhetorical black. "Could have been" was transformed to "was," possibility became probability. The bureau hid this sorcery from the prying eyes of outside scientists.

Kelly and Wearne's account of these mishaps is both good and original. But as Samuel Johnson once observed, the part that is good is not original, and the part that is original is not good. The mind-numbing recitation of instances in which lab chemists didn't keep good bench notes, bickered over standards and protocols, or gave unconvincing trial testimony because they were trying too hard to help the home team, is by this point old news. The sloppy practices and procedures have been under the hot lights before Congress and a detailed investigation by the Justice Department's Inspector General (mined to good effect by the authors). The FBI has, for the most part, confessed and vowed to straighten out the lab. That story is told here again, and convincingly.

But what's new? For that we have a more sinister tale about supposed efforts to frame innocent men by unprincipled zealots masquerading as forensic scientists. That FBI agents are not disinterested scientists, but rather have a pro-prosecution bent, will not surprise any in the world of law enforcement. It is the authors' claim that the bureau's lab was stocked with Inspector Javerts, bound at any cost to get their man, rather than bumbling Clouseaus, that goes beyond the routine lab flogging that has emerged to date.

What's the proof? We begin with the book's pro-

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tagonist and number one source, FBI chemist Frederic Whitehurst (to whom the book is dedicated). Whitehurst is portrayed, not surprisingly, as a star agent of courage and conscience, a "brawny six-foot-two-inch" Vietnam vet, "[p]edantic, methodical, straight as an arrow." His complaints about unsound practices in the FBI lab seem well-founded, and his critiques of the work of his colleagues may be correct. But even in the one-sided telling, there are hints that Whitehurst is, well, something of a nut. When others failed his standards — even where he personally had confirmed the lab's conclusions — he decided to sabotage the prosecution by going secretly to work for the defense. As the authors note, "It was a strange case for which to break all the rules and risk his career."

Whitehurst's efforts at martyrdom might make sense if, say, he was preventing the execution of innocent people on the strength of fake evidence. But in substantial part he appears to have been expressing a fastidious revulsion at the Pigpen practices of his fellow chemists. When the authors hold their magnifying glass to the FBI's scientific work, they find no case in which the lab concocted false evidence and thereby secured the conviction of an innocent person.

Perhaps that's because their examples were picked for their high profile rather than their reliance on fake forensic proof. Take Ted Kaczynski, the "Unabomber" seized in his shack in the midst of bomb supplies and written records amounting to a confession. It's hard to make the case that he was framed, and indeed the point seems to be that better forensic science would have found and stopped him more promptly. In other celebrated cases the authors rehash the evidence but make no convincing claim that an injustice was done.

The most interesting example may be the prosecution of Walter Leroy Moody, twice-convicted of the mail-bomb murder of federal judge Robert Vance. The authors claim Moody's first trial was tainted by phony forensic science. The bureau erred by honing in on Moody based on one of his prior bombs. As Whitehurst could have told them, that bomb was not identical to the Vance bomb. And it hadn't been conclusively proved that Moody had built the prior bomb; he'd only been convicted of possessing it. They hadn't even found bomb ingredients in Moody's house. According to the book, the bomb comparisons were highly subjective, prosecution-oriented pseudo-science.

Yet all of this and more was pointed out in detail by Moody's lawyer. There was no shortage of cross-examination on the basis or lack of basis for the experts' conclusions. In the end, the jury convicted Roy Moody. And while one suspects that the full story of the trial is left untold, enough is hinted about the evidence to understand why quibbling over bomb "signature" was unlikely to spring Roy Moody. For instance, there was the wiretap tape that had him muttering about having "killed two.... Now you can't pull another bombing." And there was his wife, the bombardier's assistant (she kept receipts when she went out, "in disguise, pay[ing] cash, wear[ing] gloves," and parked away from the stores to buy his boxes, tapes, string, wire, solder, rubber gloves, etc.). And his friend, Ted Banks, who testified that he had cut pipes (as in pipe bomb) and acquired gunpowder for Moody.

The Moody trial proves nothing about junk science in the courtroom, much less FBI complicity in "tainting evidence." The limitations on the expert testimony were there for the jury to see. The authors' — and Moody's — real beef is with the defense attorney, Mr. Tolley, who in their view was insufficiently zealous in his rooting out of the heresy. But they fail to show any respect in which Tolley failed to provide appropriate representation. His decision not to call defense experts is hard to challenge, based on the apparent success of the defense cross-examination of the government experts. His choice to stipulate to certain summary testimony from a single FBI agent, rather than require squads of agents to take the stand, cannot fairly be criticized based on the limited evidence provided. The barely veiled suggestion that Tolley "acquiesced" in his client's conviction — threw the case — is unfounded and unfair.

Ironically, this is precisely the kind of overstepping for which the authors chide the FBI lab. But perhaps it's human nature. Authors attempting to make a persuasive case, agents trying to bring the guilty (in their view) to justice, all have the motive to reach for conclusions that may or not be supported. Juries are properly instructed to be on their guard, and to look for the support behind the conclusions. Experts should not be and typically are not permitted to cloak themselves and their conclusions in mystery.

To be fair, there appears to have been much Mr. Whitehurst could and would have done better in some of the cases described. The book becomes tendentious, however, in its single-minded focus on "forensic science" to the exclusion of almost all else. Grant that the science offered by the prosecution in some or even all of these cases was deeply flawed — call it utter junk. The issue is whether the evidence in the cases, all the evidence, was sufficient to convince the jury of guilt beyond a reasonable doubt. On that critical point the book has little to tell us. ●

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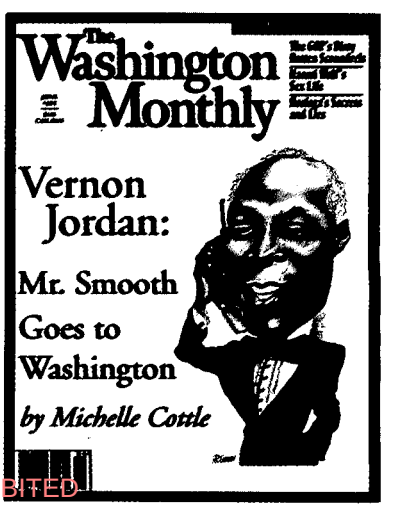

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Political Booknotes

Truth in Rumors

by Eliot Sloan

In the mid-1930's, rumors spread around America like a forest fire, whispering that Franklin Roosevelt was mentally deranged. Some claimed to have heard shrieks and laughter emanating from the windows of the White House, and others solemnly explained that the bars on the president's windows were there to keep him from throwing himself out onto the lawn in a maniacal fit. Tongues began wagging faster as the gossip caught on: His polio had spread to his brain, he was discovered cutting out paper dolls instead of working, he had been seen breaking into fits of uncontrollable laughter during press conferences, and now he was babbling all sorts of entertaining nonsense during meetings.

When a journalist finally got up the nerve to inquire directly about the president's mental status, FDR, holding his cigarette holder and leaning back in his chair, began to laugh a loud, healthy laugh. *Newsweek* reported: "Back to the roomful of correspondents he tossed the question. How did they think he looked? 'Okay from here.'"

These rumors about the president, *New York Times* editorial writer Gail Collins tells us in her lively new book, flourished so successfully because they contained a thread of truth: a genuine public fear about the president's health. While most Americans at the time knew that FDR suffered from polio, very few had actually seen him, and many could not bear to imagine their president, a paragon of strength and leadership, as an invalid. Since FDR made special efforts to conceal his disability, and since reporters rarely depicted the president in his wheelchair, much of the public remained in the dark as to his real condition. Gossiping about his health was a way to release pent-up concerns about the president, under the umbrella of dramatized, embellished entertainment.

Gossip, Collins argues, "provides an insight into what's bothering Americans — maybe not as precisely as a random cross-sample poll of the voting public, but with a little more flavor." From Civil War rumors that President Lincoln had "Negro blood" and was nicknamed "Abraham Africanus the First," to stories of Prohibitionist Americans angrily pointing fingers at Teddy Roosevelt's drinking habits, Collins' book traces the history of American gossip through the eyes of the public. She gives us all the sordid details and all the delicious rumors from the safe seat of the talker instead of the talked-about. With humor and insight, Collins offers every view of the truth, the almost-true, and the too-juicy-to-be-true. The real essence of the book, however, lies not in the titillating tales about what happened to whom in what room, but in Collins' discussion of the social context that allows rumors to run wild.

SCORPION TONGUES: Gossip, Celebrity, and American Politics
by Gail Collins
William Morrow & Co., $25

Collins argues that gossip "really does need some kind of context to give it meaning." Take, for example, the current allegations of presidential philandering. Collins attributes gossip's ability to spread so quickly and so out of control to the speed of our high-technology era, in which a rumor zooms from people's mouths directly into e-mail gossip loops, before it even hits MSNBC. Though similar rumors about presidents occurred in the past, technology has given our era a whole new power to catch the ball running.

Today, with easy access to TV and computers, the media would find it almost impossible to shield us from FDR's illness. Rumors about Honest Abe would also be dead on arrival because the question of whether the president has some interracial ancestry is no longer at the top of our concern list. Truly effective gossip — the kind that results in huge headlines and around-the-clock coverage — has to strike larger cultural chords in order to take root. Only if the rumor is relevant to our era, explains Collins, will it take off. As in a Rorschach test, the American public brings all of its anxieties, neuroses, and projected fears to the gossip arena. The ink blots of political figures cannot be judged objectively without our timely concerns right there in the front row, cheering us on.

Political figures, she makes clear, can be hurt by gossip only when it is out of sync with our view of their character. Gary Hart portrayed himself as an upstanding husband, which is why, when the media caught him frolicking with Donna Rice, the public exploded. Clinton's public ratings are still high, Collins claims, because he has done nothing inconsistent with the image the American public formed of him back in 1992.

Collins remains agnostic on the question of Clinton's alleged misbehavior. But she does end with a question about what will happen to gossip if public standards of behavior — and of privacy — continue to erode. "It's impossible, after all, for people to speculate about who is breaking the rules behind closed doors when there are no rules left that matter."

Eliot Sloan *is an editorial intern at* Harper's *magazine.*

Right Diagnosis, Wrong Rx

by Margaret P. Battin

Give it up. That's well-known bioethicist Dan Callahan's new advice on what to do about expensive, extensive health care, and how to control the out-of-control costs of medicine. Give it up, or at least give up a lot of it.

This isn't new advice from the author. We're fortunate to have had plenty of advice over the years from

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Callahan, one of the most articulate and thoughtful bioethicists working anywhere in the world. The central idea all along has been a piece of basic, how-to-live-and-end-your-life advice to Americans:

don't fight it (death)

don't ask for it (expensive life-prolonging treatment)

don't expect society to provide it for you (elaborate, unusual treatment)

don't expect to get it (perfect health) unless you're willing to be responsible for it yourself.

Now, Callahan's advice has broadened from exhortations to patients into a full-scale critique of the medical establishment. He's always told us that, as patients, we shouldn't be greedy for more — more medical treatment, more health care expenditures, more life. But now he adds to it a trenchant account of how our assumptions about the nature of medicine invite medicine to take control of us, to make us greedy for more.

Here's our mistake: We think of medicine as progressive and perfectionist. It's a science, after all. We trust that, given enough research time and money, medical science will continue to conquer our diseases and improve our health. And while we're not so naive as to suppose that we'll all be guaranteed it all the time, we still take perfect health as medicine's ultimate goal. In this way, we create medicine's agenda and then buy into it, so that we come to believe that this is what medicine can (and should) do for us.

But we trick ourselves: Medicine is, in actuality, "expansionary" and "progress-obsessed." It doesn't have our interests in mind as much as its own; it is more a huge conglomerate of increasingly commercial interests, creating new markets for its own procedures and products. It is like an enormous cancer that will swallow all our resources and dash all our hopes. America's quest for perfect health is a recipe for failure, a prescription for disaster.

What we need instead, argues Callahan, is a "sustainable," "steady-state" medicine, a health care system (preferably, a single-payer one) that would guarantee us a decent basic level of care and, in return, expect increased personal responsibility for health.

Such a system would emphasize public health medicine — measures designed to improve the health of a population, not of specific individuals. This means providing a health-favoring environment, keeping dangerous elements out of the food supplies, having children immunized — and, especially, calling attention to the risks of poor health behavior: Don't smoke. Drink moderately or not at all. Be vigilant at the dinner table. Exercise, even if it is a cold dark night after a tiring day of work.

FALSE HOPES: Why America's Quest for Perfect Health is a Recipe for Failure
by Daniel Callahan
Simon & Schuster, $24

Of course, Callahan admits that responsibility for one's own health is "Wearisome. Boring. Dispiriting." But those who don't do it should be blamed (yes, blamed!), and public funds should not be used to clean up the mess.

Appropriately tamed health care would limit, not expand, patient choice: no fancy rescue medicine where it makes little sense, increased pressure to live right. It would still allow those willing to pay for more elaborate health care to do so, but the basic, socially supported care provided to all would be just that — basic. High-tech health care wouldn't be wasted on people over 65 or on babies with terrible defects or on routine screening for low-risk conditions or other "black-hole" problems that endlessly consume public resources.

How good does this basic level of health care need to be? Callahan gives a communitarian answer: The basic level of care should be whatever is sufficient "to ensure civic functioning" — to allow children to function in schools, workers to function at their jobs, parents to function in child-rearing, citizens to exercise their roles in a political society. We don't need perfect health for this; "good enough" will do. To hope for anything more, at least at

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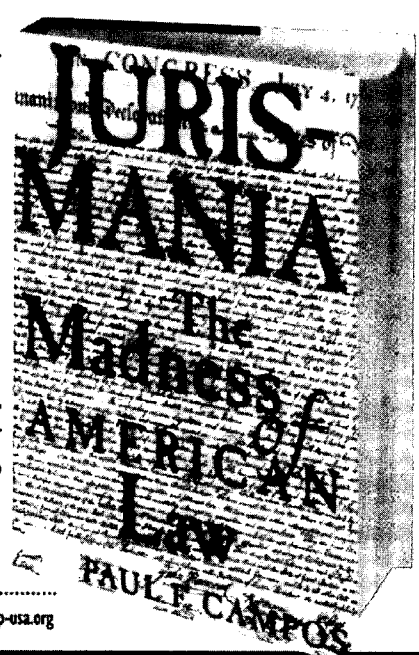

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public expense, is to buy into the false hopes that medicine fosters.

Callahan's vision of a sustainable, steady-state, basic medicine isn't confined to the U.S.; one of the really admirable things about Callahan's view is its global scope. Health care in much of the developing world isn't anywhere near as good as it should be; in the U.S. and the other fancy industrialized nations, in contrast, it's far too good and far too expensive. Rather than watch the disparities between medically poor and medically rich nations increase, we should improve the dismal care now offered in many woefully underfunded systems in the Third World but rein in the excesses of engorged systems in the fat nations, so all citizens of the world can enjoy approximately the same hopes.

What are these hopes — appropriate hopes, not the false ones Callahan attacks in his title? A normal lifespan, relief from chronic physical suffering, treatment for trauma and disability where reasonable function can be achieved. But forget living on into "ancient" old age, the repair of every injury, purely cosmetic surgery, extensive infertility treatment, or trying to save tiny newborns with desperate prognoses.

This doesn't mean just cutting out waste, and Callahan is honest about this. It means cutting back on useful technology that improves health and saves lives. It means not trying to save people with rare, expensive-to-treat diseases; it means letting people with terminal illnesses die earlier than might now be the case; it means not trying to restore perfect function if some physiological system has failed. It doesn't always mean giving up, but it often means not trying very hard.

That's Callahan's picture. Required reading, important, indeed imperative to think about. But I think we shouldn't swallow the medicine even after we've seen the prescription.

The analogy between "sustainable" medicine and "sustainable" ecological practices is engaging, but in the end unpersuasive. Sustainable ecology has to do with not using up nonrenewable environmental resources. But health care is different. Health care is primarily a service, not a nonrenewable resource like minerals or fuels, and while it certainly uses resources to manufacture its CAT-scanners and surgical bandages and tongue depressors, the heaps of used hypodermics left over as medicine does its work aren't the limiting feature we are worrying about.

It's money. But money isn't an exhaustible resource; it's an indicator of how much societal effort we decide to devote to a given purpose. We can supply all the care we want, if we're willing to spend the time doing it; and in this respect "sustainable" health care isn't like "sustainable" energy policy or any other ecological issue. The real question is about priorities, not usage. Callahan thinks our priorities for medicine ought to be lower; I think they ought to be higher, though for medicine trimmed of waste and refocused in many of the ways Callahan suggests.

In the end, Callahan's prescription is wrong — or if it's right, it's only half strength. Much of what he has to say is indeed the right medicine for what ails our health care system. But "good enough" isn't really good enough, when it means giving up on patients just as their needs become great. For the vast majority who will need only basic care throughout their lives to write off a minority who need more help is indecent; to give up on the dying because they are dying is inhumane. Callahan is right that medicine, like any expansionist commercial conglomerate, is capable of engendering desires that are not really genuine, and he is also right that medicine is guilty of unconscionable waste, but it is a mistake to confuse trumped-up wishes for pointless treatment with real, human desires for meaningful care. Community interests ought not override the needs of the individuals who make up that community, if it is possible to provide for both. Callahan assumes that it isn't possible; but many of the insights he provides suggest that it is.

MARGARET P. BATTIN *is a bioethicist at the University of Utah and author of* The Least Worst Death *and* The Death Debate.

Guns and Numbers

by Jens Ludwig

IT IS ALMOST IMPOSSIBLE TO separate the problem of crime in America from questions about how guns should be regulated. There is typically some uncertainty about how a change to our gun laws will impact crime, since guns in principle have both helpful and harmful aspects.

Given this uncertainty, it is noteworthy that more than 30 states have now passed "right-to-carry" laws that allow private citizens to carry concealed guns. Proponents of these laws hope that increased gun carrying will increase the "costs" of crime and thereby deter some criminals. Yet it's also possible that some criminals will respond to an increase in gun carrying among the citizenry by using a gun more frequently themselves, which may increase the number of shootings that result from street crimes. The other potential drawback of these laws is that the daily annoyances of modern life, such as rude driving or Yankees fans, can lead to fights that would be more lethal if one or both of the parties is armed.

Ideally, we would measure the effects of right-to-carry laws by comparing the crime rate that a state like Idaho experienced after enacting a right-to-carry law in 1990 with the crime rate that Idaho would have experienced had that state not enacted a right-to-carry law in 1990. Because we cannot actually observe what would have happened had this law not passed, we are forced to compare Idaho with other states without such laws, such as California. The challenge is to statistically control for all of the relevant factors that will cause crime to be different between places like California and Idaho. (This is not a trivial exercise, since reliable measures for many of these factors are simply not available.)

The first attempt at a national study of the effects of right-to-carry laws is found in a new book by John Lott Jr., whose conclusions are hint-

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ed at in the book's title: *More Guns, Less Crime*. The book is a dizzying collection of 27 graphs, 27 figures, five appendices, 30 pages of footnotes, and even a few qualifications about the research. Most readers are unlikely to appreciate the importance of these qualifications, and will walk away with just the message of the concluding sentences: "Will allowing law-abiding citizens to carry concealed handguns save lives? The answer is yes, it will." This is unfortunate, since Lott's analysis ultimately cannot support his conclusion.

MORE GUNS, LESS CRIME: Understanding Crime and Gun Control Laws
by John R. Lott Jr.
University of Chicago Press, $23

John Lott first called me in August 1996, as I was enjoying a cup of coffee in my windowless office at Georgetown University, to invite me to discuss his paper at a forum sponsored by the Cato Institute. I had never heard of Lott and barely knew where the institute was, but he asked nicely and I thought there might be a free lunch involved. (As it turns out, there was.) My job was to determine whether Lott's article had solved the relevant statistical problems that plague this type of inquiry.

Several aspects of Lott's statistical approach struck me as troublesome. For example, he cannot adequately control for the fact that states with right-to-carry laws and those without are different with respect to poverty, gangs, drugs, and police practices. Inadequate controls for these factors will cause Lott's analysis to reveal that California has a different crime rate from Idaho even when this difference is unrelated to right-to-carry legislation. The concern that his statistical "fixes" might not fully correct for these problems received some support from his results: Several findings don't line up with previous research in criminology or common sense, and some of his findings were grossly inconsistent with each other. (For example, the implied effects of right-to-carry laws on homicide are 8 percent in Table 3 and 67 percent in Table 11.) There seemed to be enough of these troublesome points to decide that his conclusions about the benefits of such laws were premature at best.

Shortly thereafter, Lott's data were reanalyzed by Professors Dan Black of the University of Kentucky and Daniel Nagin of Carnegie-Mellon. Their reanalysis was published this January in the same journal that carried Lott's original article, and provided more support for my fears about the Lott study: A well-known statistical test revealed that Lott's methods produce misleading estimates. When Black and Nagin address this problem using Lott's own data, they find no evidence that right-to-carry laws reduce crime. Other reanalyses have also cast doubt on Lott's findings, including my own study, currently in press at U.C. Berkeley.

The results from Lott's original article form the heart of this book. While he includes a chapter that contains replies to his critics, unfortunately he doesn't directly respond to the key Black and Nagin finding that formal statistical tests reject his methods. The closest he gets to addressing this point is to acknowledge "the more serious possibility that some other factor may have caused both the reduction in crime rates and the passage of the law to occur at the same time," but then goes on to say that he has "presented over a thousand [statistical model] specifications" that reveal "an extremely consistent pattern" that right-to-carry laws reduce crime. Another view would be that a thousand versions of a demonstrably invalid analytical approach produce boxes full of invalid results.

If there are now well-documented problems with Lott's research, what can account for the attention that journalists, politicians, and others continue to devote to this work? The answer can be found in part in some of the responses to his original article, which, regrettably, included attacks on his integrity as an academic researcher. Lott has thus been able to paint himself as the victim of those who are out to enforce the "politically correct, anti-gun orthodoxy." This distraction has apparently caused some observers to discount the growing body of evidence on the central limitations of Lott's analysis. To dispel the notion that Lott is simply being victimized by the "PC crowd," it may be helpful to mention the reaction of Gary Kleck, a Florida State criminologist known for his generally "pro-gun" views, who has launched a nasty attack on the public health community for what he perceives to be its "anti-gun" stance. Kleck argues in his recent book that it is "more likely [that] the declines in crime coinciding with relaxation of carry laws were largely attributable to other factors not controlled in the Lott and Mustard analysis."

Most of us would be inclined to support right-to-carry or other changes to our gun laws if they would save lives. While *More Guns, Less Crime* cannot answer this question, the discussion surrounding the book may nonetheless be helpful by highlighting how much more we still need to know about the role of gun laws in addressing our nation's crime problem.

JENS LUDWIG *is a visiting scholar at the Northwestern University/University of Chicago Joint Poverty Center.*

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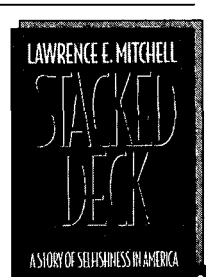

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Televiolence

by Stephen Metcalf

IN 1996 TWO TEENAGERS, AFTER repeated viewings of Oliver Stone's movie "Natural Born Killers," committed a brutal murder. One of the victim's friends later wrote a letter of protest. Stone's film, he argued, should not be allowed the excuse of artistic freedom. Instead, the film should be treated as a product, "something created and brought to market, not too dissimilar from breast implants." If something goes wrong with the product, he concluded, "either by design or defect, and injury ensues, then its makers are held responsible. It will take only one large verdict against the likes of Oliver Stone, and his production company, and perhaps the screenwriter, and the studio itself, and the party will be over. The verdict will come from the heartland, far away from Southern California, in some small courtroom with no cameras. A jury will finally say enough is enough, that the demons placed in [the killer's] mind were not solely of her own making."

MAYHEM:
Violence as Public Entertainment
by Sissela Bok
Addison-Wesley, $22

Is it a coincidence that the author of this letter was John Grisham, creator of such bestselling literary products as *The Firm* and *The Pelican Brief*? Many of us may share Grisham's outrage, and might even be happy to sit on such a jury. But we may also suspect the task is at once subtler and more awesome than Grisham allows. How do we begin to pinpoint causality when considering an act of violence? How can we distinguish art from schlock when labeling a movie a mere "product"?

The presumably intractable nature of such questions has limited debate on the subject, but has not deterred Sissela Bok, an accomplished public philosopher and the author of widely acclaimed books on lying and on secrets. With her new book, Bok seeks to initiate a "probing society-wide discussion on violence in society and its links with cultural life, including all forms of entertainment."

Bok is in no hurry for Grisham's version of heartland justice, but is fed up nonetheless with the interminable hand-wringing that postpones any serious discussion about violent images in TV and the movies. She identifies the sources for our inertia perceptively: First, we have placed the bar of empirical proof for the causal relationship between the consumption of violent images and deleterious effects way too high. The tobacco lobby put off cigarette legislation for decades with similar arguments; instead Bok urges us to settle for "probabilistic causation," or the intelligent suspicion that the nightly carnage piped into living rooms everywhere has a meaningful impact on viewers. Second, our national fetish for the First Amendment now has the perverse effect of stifling free thought, stopping any discussion about how obscenity laws might cover violent as well as sexual images dead in its tracks.

It is this second assertion, of course, that will give civil libertarians pause. Bok tells us in its day Moliere's great play "Tartuffe" was a "symbol of depravity to some, evidence of [theatre's] glory to others." Doesn't this counsel us to err on the side of permissiveness? Bok's position on the suppression of violent images by law is not exactly announced outright; instead she leads us through a thumbnail history of Church Fathers, Thomas Bowdler and French theatre, then canvasses pundit-academics, from the prudish Robert Bork to the libertarian Nadine Strossen, only to assure us in the end that the distinction between violence and gratuitous violence can be perspicuous. She offers the unassailable example of "Schindler's List," a "film about gratuitous violence, without in any sense exploiting it or representing an instance of it." This is certainly true, but what about the bloody films of Samuel Fuller and Sam Peckinpah? While Bok acknowledges the persistent difficulty of borderline cases, she has a habit of gazing on popular culture as if from quite a distance, leaving the issue conveniently blurred.

The moral center of Bok's book, however, is unmistakeable: Children have the right to flourish as autonomous beings, capable of rational self-direction and choice. Society, furthermore, has the duty to nourish that development. How can this be reconciled with TV's relentless marketing juggernaut? TV programs are little more than bait, sleekly crafted delivery systems for commercials; and violent programming, Bok surmises, is designed to put us in a state of semi-arousal for the ads, which act as little oases in between homicides. All of which adds up: A television character, by some estimates, is a thousand times more likely to be raped, tortured, maimed, or killed than an average person. Bok insists that no particular crime need ensue for this to be socially toxic: Heavy viewers, for example, begin to suffer from the so-called "mean-world" syndrome, with its baleful feedback effect of keeping people indoors, where they watch more TV, becoming even more convinced of the risk of leaving their home.

For adults as well as children, TV creates a vast no-place where it is difficult to find the moral purchase to organize and protest. Of course, into TV's no-place come Commissions and laments and 10 minutes of pseudo-introspection, all substitutes for real change, before the inevitable cut back to Jerry Springer. Bok describes this well, but unfortunately backs away from anything too radical, allowing Cass Sunstein and a handful of law professors to make the argument for governmental regulation for her. In the face of the carnage she so vividly conjures, Bok's solutions are surprisingly tepid and familiar: We must trust in conscience and private-sphere solutions, such as more self-scrutiny and restraint on the part of journalists and producers, more responsibility and fortitude from parents, and the V-chip.

All of which isn't to say Bok's work doesn't have a serious moral center: It does, and it's the well-being of children. Bok's may not be the last word on American violence and the industries of distraction, but she inspires us to ask how we can treat children as something more than the "radio fodder and television fodder" they seem to have become.

STEPHEN METCALF *is a freelance writer living in New York City.*

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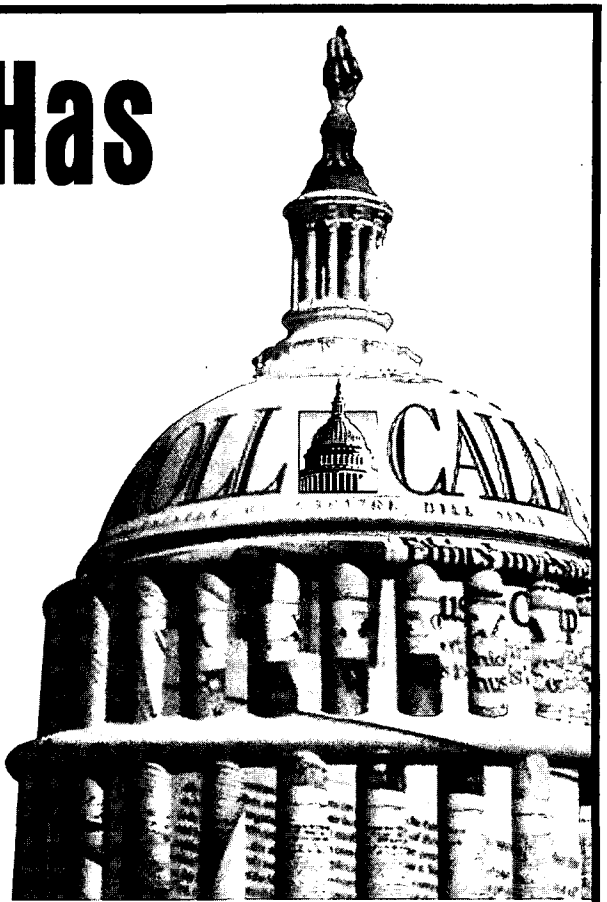

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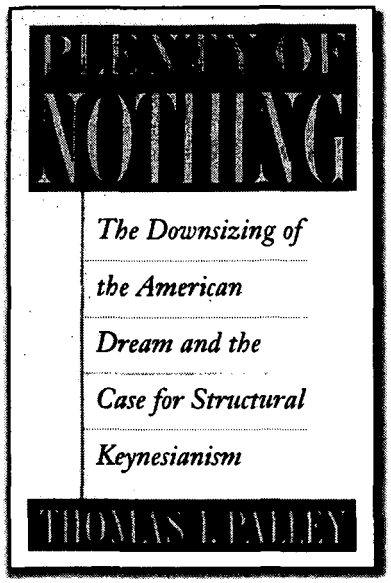

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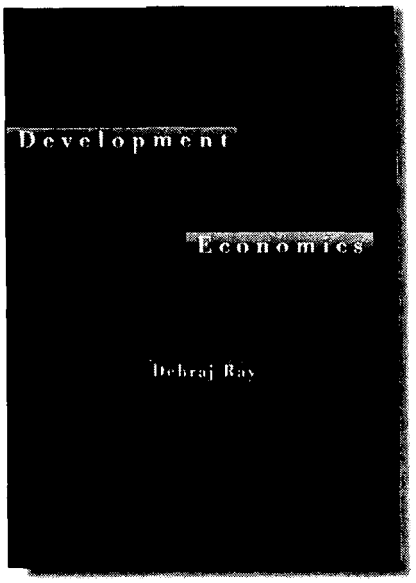

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